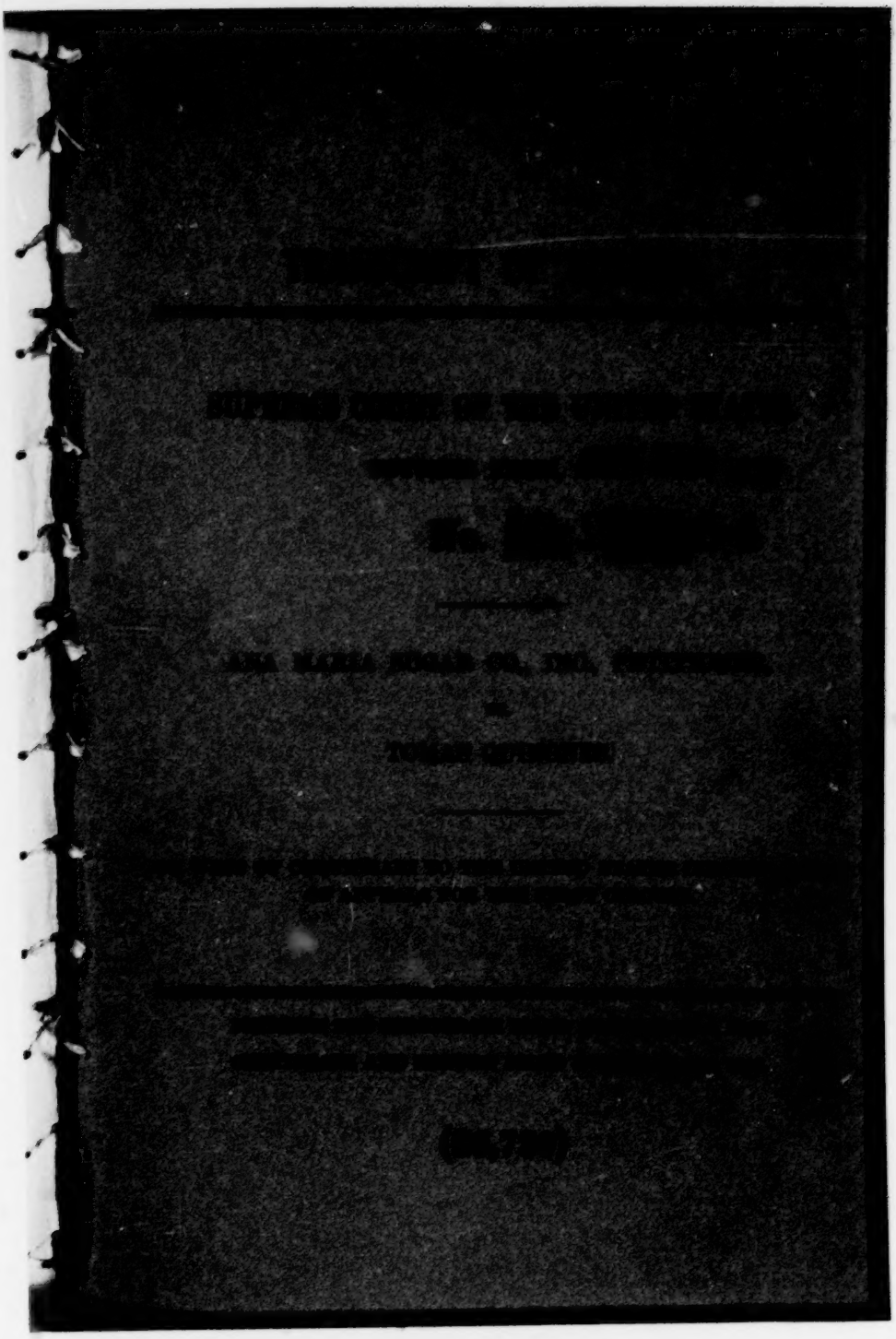

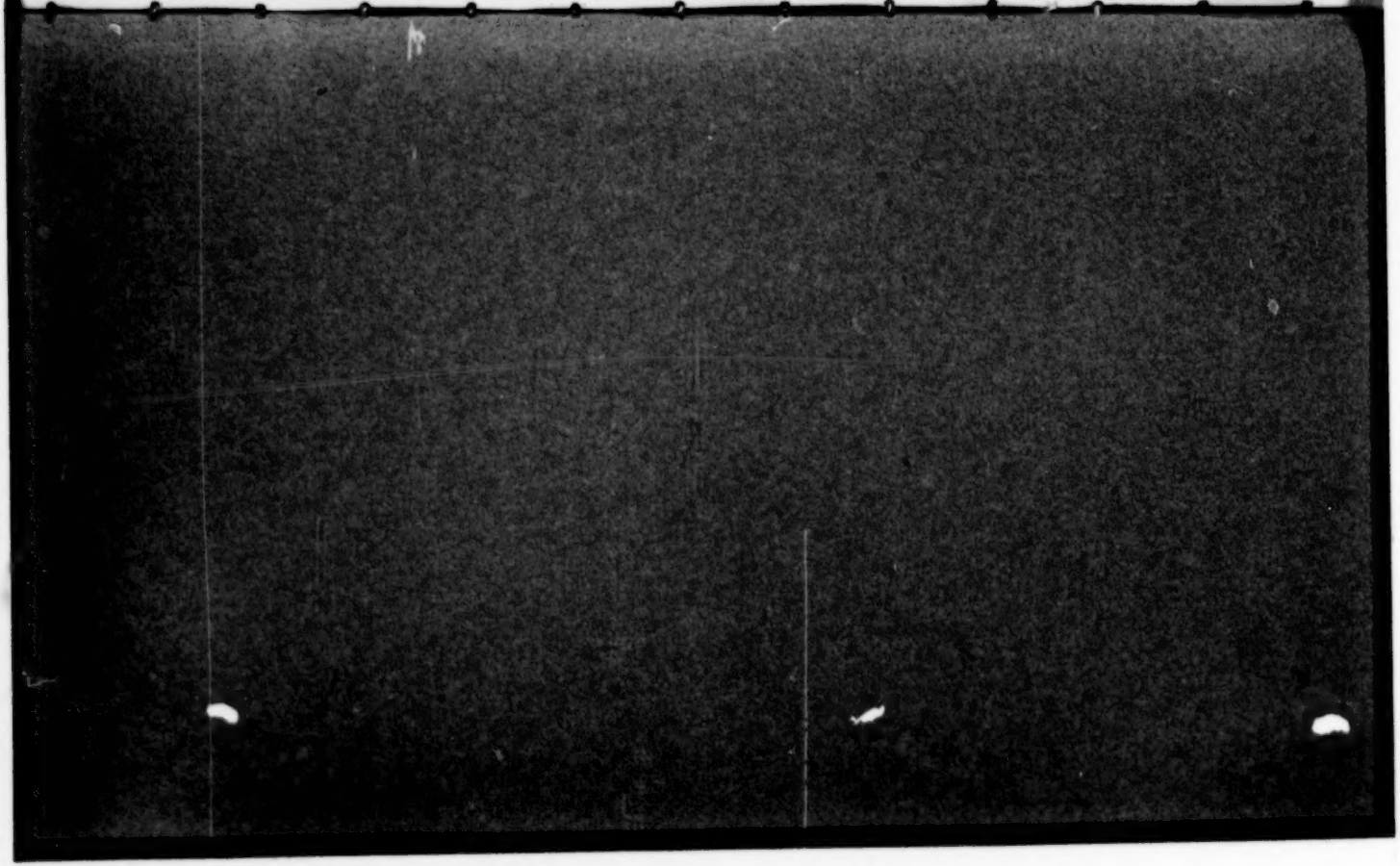

(26,739)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 653.

ANA MARIA SUGAR CO., INC., PETITIONER,

vs.

TOMAS QUINONES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 12, 1919.

a United States Circuit Court of Appeals for the First Circuit, October Term, 1916.

No. 1295.

ANA MARÍA SUGAR CO., INC., Defendant, Appellant,

v.

TOMÁS QUINONES, Plaintiff, Appellee.

Appeal from the Supreme Court of Porto Rico from Judgment, December 19, 1916.

TRANSCRIPT OF RECORD.

Leopoldo Feliú, Hugo Kohlmann, Curtis, Mallet-Prevost & Colt, for Appellant.
Jorge Dominguez, for Appellee.

Boston: Printed under direction of the clerk. 1917.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1916.

No. 1295.

ANA MARÍA SUGAR CO., INC., Defendant, Appellant,

v.

TOMÁS QUINONES, Plaintiff, Appellee.

TRANSCRIPT OF RECORD.

[Filed in Circuit Court of Appeals August 3, 1917.]

Judgment Roll.

In the District Court of Mayaguez, Porto Rico.

No. 4754. Civil.

TOMAS QUINONES, Complainant,

v.

ANA MARÍA SUGAR COMPANY, INC., Defendant.

Action to Recover Damages.

Amended Complaint.

Now appears the complainant, by his counsel, José Sabater, and, by leave of the court, files his amended complaint, stating as cause of action the following facts:

I. That the complainant is a merchant with establishment opened in this city of Mayaguez, and the defendant is a corporation
2 duly constituted under the laws of Porto Rico, also having an office in this city.

II. That on August 4, 1914, and in the city of Mayaguez, plaintiff bought from defendant 740 sacks of centrifugal sugar, second class, at the rate of three dollars and twenty-two and a half cents per hundred weight ($3.22½), according to the custom of this market, cash value at the moment of delivery.

III. That at the request of the defendant itself, and for the exclusive convenience of the latter, plaintiff and defendant agreed that the sugar sold should be delivered to the plaintiff, in lots or partial cargoes, by the end of the week subsequent to the date of the contract, to wit, the 15th of August, 1914.

IV. That the defendant, entirely departing from the stipulations of the contract of purchase of the sugar as made, required of the plaintiff, by letter received by the latter on August 5, 1914, that he should make a previous deposit of the total amount as shown by the invoice sent for the sugar sold, amounting to six thousand seventy-nine dollars ($6079).

V. That plaintiff notified the defendant corporation by letter, sent on the same day, August 5, 1914, that he was willing to accept the delivery of the article in one single day, and pay the total amount of the price agreed upon at the moment of said delivery.

VI. That on August 6, 1914, the defendant corporation informed the plaintiff that the contract of sale of the sugar, referred to in the foregoing paragraph, had been cancelled.

VII. That the defendant corporation has not made the delivery of the sugar sold to the plaintiff, either in part or in whole, and refuses to deliver the same as provided in said contract.

VIII. That plaintiff has always been willing to receive the sugar so sold, and pay for the same the price agreed, upon delivery of the same, and has complied with all the stipulations of the contract.

IX. That on August 10, 1914, plaintiff legally offered, and in good faith, to make a deposit of the total sum of the invoice already presented and received for the sugar sold, amounting to
3 $6079, instructing to that effect the Royal Bank of Canada in this city of Mayaguez, and that in spite of this the defendant always refuses to make the delivery of the sugar sold.

X. That solely to the failure of defendant in delivering the sugar sold to the plaintiff, the latter has suffered damages in the amount of $6173.24, that being the amount of the difference in price of the sugar due to the rise that occurred in the week between the 10th and 15th of August, 1914.

Wherefore, plaintiff prays for a judgment in his favor in the sum of six thousand one hundred and seventy-three dollars twenty-four cents ($6173.24), with legal interest on that sum from the 15th of August, 1914, until full payment, with costs, expenses, disbursements and attorney's fees.

(Signed) JOSÉ SABATER,
Counsel for Plaintiff.

Served with copy of the foregoing amended complaint today, October 27, 1914.

(Signed) LEOPOLDO FELIU,
Counsel for the Defendant Corporation.

Answer.

Now appears the defendant, and answering the amended complaint of the plaintiff makes the following allegations:

I.

That it denies, in a general and specific manner, each and every one of the facts alleged in the said complaint.

II.

And as new matter in opposition to the complaint and the cause of action brought by the plaintiff, the said defendant alleges:

I. That on or about August 4, 1914, in the city of Mayaguez, Porto Rico, plaintiff and defendant entered into or had certain negotiations as to a sale by the latter to the former of 748 sacks of cane sugar, which was to be carried out on the following terms:

Plaintiff was to make a previous deposit on that very day in the Royal Bank of Canada, at Mayaguez, Porto Rico, and in favor of the defendant, of the amount of the purchase price of said sugar, to wit, the sum of $6079, and once the deposit was made the defendant was to deliver the said sugar to the plaintiff in partial lots of 160 sacks, the first by railroad, upon receipt of the order of the Bank to that effect, and the remainder by cart-loads during the week next to the aforesaid date.

II. That the stipulation as to the previous deposit of the value for said sugar in the said Bank had to be, and was, a condition previous and precedent to the obligation of making the delivery of the sugar by the defendant to the plaintiff, which was imposed and accepted by the defendant, inasmuch as the said sugar was subject to a lieu [sic] upon the same with said Royal Bank of Canada, in Mayaguez, according to which contract the defendant could not dispose, in any manner, of said sugar without first making a deposit of the value thereof, and obtaining the proper authorization by said Bank, all of which was known to plaintiff at the time of the said negotiations.

III. That plaintiff refused to comply and accept the said prerequisite condition of the prior deposit of the amount of said sugar, and then proposed to the defendant, about the 5th of August, 1914, that the delivery of the sugar, which is the object of said negotiations, and to which this complaint refers, should be made by defendant in one single day, and he should pay the value of same once the delivery of each lot was made, whose offer or proposition was refused by the defendant; and defendant now alleges that plaintiff did not make any payment or offer to pay, or tender on said dates the said sum which was the value of the sugar involved in said trans-

actions, either in part or in whole, or in any manner, and, based upon these considerations, the defendant alleges that the said negotiations never became a contract.

As special and additional defenses to said cause of action, the defendant alleges:

I. That even if the negotiations had between plaintiff and defendant, on said date of August 4, 1914, constituted a consummated contract binding upon both parties, the said contract was terminated and rescinded by the plaintiff himself in refusing to make a deposit of the amount of the purchase price of the sugar, above mentioned, in the manner stated in this answer, and in making his proposition for delivery of the sugar in a manner and upon a date different from that specified and agreed in the alleged contract, on which the plaintiff bases this suit.

II. That the plaintiff was not, at the time of beginning this action, registered as such merchant in the Mercantile Registry, and therefore he has no personality nor legal capacity to bring this action in the character assumed by him.

III. That plaintiff is estopped from claiming anything from the defendant by reason of the alleged contract upon which he bases his action, or otherwise.

IV. That the complaint does not state facts sufficient to constitute a cause of action.

Counterclaim.

By way of counterclaim, and as set off to the claim of the plaintiff, the defendant alleges:

I. That on the dates to be mentioned hereafter, the defendant was a corporation constituted under the laws of Porto Rico, and engaged in the business of manufacturing cane sugar, which was to be sold in the markets of this island and of the United States, having already invested in said business at that date about one million of dollars, for the development of which there was installed in the Municipality of Mayaguez a factory with all the machinery and necessary apparatus for such industry, and for the proper care and development of the said business.

II. That owing to the peculiar nature of this business, the reputation and good name of the defendant, as regards its uprightness, seriousness, honesty and accuracy in its operations and transactions, are necessary for the prosperity of said industry.

III. That on or about August 7, 1914, in the city of Mayaguez, Porto Rico, intentionally and without just cause or excuse, and with the only purpose of causing injury and damage to this defendant in its said business, and of discrediting it as to its uprightness and formality in its business, the said plaintiff caused to be published, and with regard to this defendant, and making reference to the same, in connection with its said business, and in a letter addressed to this defendant and by him signed, the following:

"I am inclined to believe that your attitude today (meaning the

defendant's) is rather an excuse for not complying with our contract due to the subsequent advance in the price of the sugar."

IV. That the plaintiff meant by said publication, and so it was understood, that defendant is not upright in its business, that it does not comply with its contracts and does not deserve the confidence of the people who deal with it, and that the said publication is false and defamatory for this defendant.

V. That by reason of said false publication the reputation and good name of this defendant has been injured in its business, and suffered damages in the sum of one hundred thousand dollars.

Wherefore, defendant prays that a judgment be rendered dismissing the complaint filed by the plaintiff and sentencing the latter to pay to the defendant the sum of one hundred thousand dollars, with costs, expenses, disbursements and attorney's fees, and that should this court render a judgment in favor of the plaintiff for any sum, that the defendant should compensate and deduct from the sum awarded to this defendant, all in accordance with its counterclaim.

(Signed) FELIC & RAMIREZ,
Counsel for Defendant.

I admit the receipt of this answer with copy, today, November, —, 1914.

(Signed) JOSÉ SABATER,
Counsel for Plaintiff.

Demurrer to Counterclaim of Defendant.

Now appears the complainant by his counsel, and files this demurrer in opposition to the counterclaim of the defendant, to wit:

That the counterclaim does not state facts sufficient to constitute a cause of action against the plaintiff.

Wherefore, it prays the court that this demurrer be sustained.

(Signed) JOSÉ SABATER,
Counsel for Plaintiff.

Served with copy of the foregoing demurrer this twenty-seventh day of November, 1914.

(Signed) FELIC & RAMIREZ,
Counsel for Defendant.

Filed this twenty-seventh day of November, 1914.

(Signed) PASCASIO FAJARDO, Jr., *Secretary*,
By FRANCISCO AZUAR, *Deputy*.

Decision.

On the 28th of January, 1915, which was the date set for the argument of the demurrer presented by plaintiff to the counter-complaint, both parties appeared by their respective counsel, José Sabater and

Leopoldo Feliú; and the court, after hearing the reading of the pleadings and the written arguments filed by the counsel, reserved its decision until today, the 31st of March, 1915, when the demurrer filed to the counterclaim, to the effect that it does not state facts sufficient to constitute a cause of action against the plaintiff, is sustained; and therefore decrees and adjudges that it be stricken out.

I hereby certify that the foregoing agrees with its original, which appears on folio 122, of book 39, of the Minutes of the Court.
(Signed) FRANCISCO AZUAR,
Acting Secretary.

Mayaguez, March 31, 1915.

I hereby certify that on this date I have sent to the attorneys, José Sabater and Leopoldo Feliú, counsel for complainant and
8 defendant, respectively, a true and exact copy of the foregoing decision, for the purposes of their notification.
(Signed) FRANCISCO AZUAR,
Acting Secretary.

Mayaguez, March 31, 1715.

Amended Answer.

The defendant now amends its answer to the complaint filed by the plaintiff, pursuant to the order of the court to that effect, in the following manner:

I.

The defendant generally and specifically denies each and every one of the facts stated in the said complaint.

II.

And as new matter of opposition to the said complaint and the cause of action brought by the plaintiff, the defendant alleges:

I. That on or about August 4, 1914, in the city of Mayaguez, Porto Rico, plaintiff and defendant entered into or had certain negotiations as to a sale by the latter to the former of 748 sacks of cane sugar, which was to be carried out in the following terms: Plaintiff was to make a previous deposit on that very day in the Royal Bank of Canada, at Mayaguez, Porto Rico, and in favor of the defendant, of the amount of the purchase price of said sugar, to wit, the sum of $6079, and once the deposit was made the defendant was to deliver the said sugar to the plaintiff in partial lots of 160 sacks, the first by railroad, upon receipt of the order of the Bank to that effect, and the remainder by cart-loads during the week next to the aforesaid date.

II. That the stipulation as to the previous deposit of the value for said sugar in the said Bank had to be, and was, a condition previous and precedent to the obligation of making the delivery of the sugar

by the defendant to the plaintiff, which was imposed and accepted by the defendant, inasmuch as the said sugar was subject to
9 a contract of loan of the same with said Royal Bank of Canada, in Mayaguez, according to which contract the defendant could not dispose, in any manner, of said sugar without first making a deposit of the value thereof, and obtaining the proper authorization by said Bank, all of which was known to plaintiff at the time of the said negotiations.

III. That plaintiff refused to comply and accept the said prerequisite condition of the prior deposit of the amount of said sugar, and then proposed to the defendant, about the 5th of August, 1914, that the delivery of the sugar, which is the object of said negotiations, and to which the complaint refers, should be made by defendant in one single day, and he should pay the value of same once the delivery of each lot was made, whose offer or proposition was refused by the defendant; and defendant now alleges that plaintiff did not make any payment or offer to pay, or tender on said dates, the said sum which was the value of the sugar sold involved in said transactions, either in part or in whole, or in any manner, and, based upon these considerations, the defendant alleges that the said negotiations never became a contract.

As special and additional defenses to the said cause of action, the defendant alleges:

I. That even if the negotiations had between plaintiff and defendant, on said August 4, 1914, constituted a consummated contract binding upon both parties, the said contract was terminated and rescinded by the plaintiff himself in refusing to make a deposit of the amount of the purchase price of the sugar, above mentioned, in the manner stated in this answer, and in making his proposition for delivery of the sugar in a manner and upon a date different from that specified and agreed in the alleged contract, on which the plaintiff bases this suit.

II. That upon the establishment of this suit the name of the plaintiff as such merchant did not appear recorded in the Mercantile Registry, and therefore he has no legal personality nor legal capacity to bring this action in the character assumed by him.

10 III. That plaintiff is estopped from claiming anything from the defendant by reason of the alleged contract on which he bases his action, or otherwise.

IV. That the complaint does not state facts sufficient to show a cause of action.

Counterclaim.

By way of counterclaim and set off to the claim of the plaintiff the defendant alleges:

I. That on the dates to be mentioned hereafter the defendant was a corporation constituted under the laws of Porto Rico, and engaged in the business of manufacturing cane sugar, which was to be sold in the markets of the island and of the United States, having already invested in said business at that date about one million dol-

lars, for the development of which there was installed in the Municipality of Mayaguez a factory with all the machinery and necessary apparatus for such industry, and for the proper care and development of the said business.

II. That owing to the peculiar nature of this business, the reputation and good name of the defendant, as regards its uprightness, seriousness, honesty and accuracy in its business and transactions, are necessary for the prosperity of said business.

III. That on or about August 7, 1914, in the city of Mayaguez, Porto Rico, and due to certain transaction- of purchase and sale of sugar sought to be made between plaintiff and defendant, intentionally and without just cause or excuse, and with the sole purpose of causing injury and damage to this defendant in its said business, and to its good name and reputation, plaintiff caused to be published, referring to this defendant, and in connection with its said business, in a letter dictated to and written by one of his employés and addressed to the defendant, the following:

"I am inclined to believe that your attitude today (meaning the defendant's) is rather an excuse for not complying with our contract due to the subsequent advance in the price of the sugar."

11 IV. That the plaintiff meant by said publication, and so it was understood by a great number of persons who read it and became informed of the same, that the defendant is not upright in its business, that it does not carry out its contracts, and does not deserve confidence of the people who deal with it, and that the said publication is false and defamatory for this defendant.

That by reason of the said false publication defendant has suffered damage in its reputation and good name with respect to the said business, and has sustained damages in the amount of one hundred thousand dollars.

Wherefore, defendant prays for judgment dismissing the complaint filed by plaintiff and sentencing the latter to pay the former the sum of one hundred thousand dollars, with costs, expenses, disbursements and attorney's fees, and should this court render judgment in favor of the plaintiff for any sum, that this be compensated and deducted from the sum awarded to this defendant, according to its counterclaim.

(Signed) LEOPOLDO FELIÚ,
Attorney for Defendant.

Service of the foregoing amended complaint having been made on me, I acknowledge receipt of a copy thereof today, April 19, 1915.

(Signed) JOSE SABATER,
Attorney for Plaintiff.

Answer to the Counterclaim.

Now appears the plaintiff in this action, and filing his counter-complaint answers the counterclaim of the corporation, Ana Maria Sugar Co., Inc., in the following terms:

I. Plaintiff admits the whole content of paragraph first of the counterclaim.

II. Plaintiff denies, generally and specifically, the whole content of paragraphs II., III., IV. and V. of said counterclaim, as they have been alleged.

III. The counter complainant alleges that the said counter-complaint does not state facts sufficient to constitute a cause of
12 action in favor of the corporation counter-complainant, basing its argument principally:

(*a*) In that the words used by the counter-defendant in the communication referred to in paragraph III. of the counter-complaint are not libelous, nor constitute a libel which may give rise to an action for damages.

(*b*) In that, even accepting that the said words were libelous, they were used in a communication of a privileged nature and on a privileged occasion.

Wherefore, as well as for the other arguments of law and of facts which will be made at the hearing of this case, the counter-defendant prays the Honorable Court to render judgment dismissing the counter-complaint in all its parts for damages by libel in this case, ordering its final archive, with costs, expenses, disbursements and attorneys' fees.

(Signed) JOSE SABATER,
Attorney for the Counter-Defendant.

Served with copy of the foregoing answer to the counter-complaint today, April 26, 1915.

(Signed) LEOPOLDO FELIÚ,
Attorney for the Counter-Defendant.

Entry of Judgment on May 29, 1915.

This case was heard, according to the regular setting thereof on the calendar, on the 27th, 28th and 29th of April, the plaintiff appearing through his counsel, José Sabater and Jorge V. Domínguez, and the defendant by its attorney, Leopoldo Feliú. And the court, after hearing the reading of the pleadings, the evidence introduced, and the written arguments made by the parties, reserved its decision until today, the 29th of May, 1915, when it is of the opinion that the law and the facts are against the plaintiff, and therefore renders judgment dismissing the complaint filed, and decreeing that plaintiff recovers nothing from the defendant, with costs, expenses, disbursements and attorney's fees in the sum of $——, to be satisfied by the plaintiff, and therefore orders that a writ of execution issue against

the plaintiff's property to satisfy the judgment; and the
13 court is likewise of opinion that the law and the facts are against the counter-claim presented by the defendant in its answer, and therefore dismisses the same in all its parts.

(Signed) CHARLES E. FOOTE,
District Judge.

Mayaguez, May 29, 1915.

Attest:
FRANCISCO AZUAR, *Secretary.*

Opinion.

In this case the plaintiff brought an action claiming from the defendant a certain sum for damages which he alleges he has sustained by reason of the failure of the defendant to deliver him certain quantity of sugar which it had sold to the plaintiff, according to a contract executed between the parties.

The complaint not being sworn —, the defendant upon filing its answer made a general denial of the facts therein stated, and filed its counterclaim, also claiming from plaintiff a sum for damages caused by libel, which said counter-complaint was duly answered by the plaintiff admitting the juridical capacity of the defendant, and denying generally the other facts alleged in said counterclaim, which are the facts considered by the defendant as libelous; alleging, further, the insufficiency of the said facts to constitute a good cause of action.

The case having been set for trial, the latter took place on the 27th, 28th and 29th of April, the plaintiff having appeared in person and by his counsel, Jorge V. Domínguez and José Salater, and the defendant by its president, Alfonso Valdés, and his attorney, Leopoldo Feliú, both parties having presented *then* documentary and oral testimony in support of their respective allegations, as well as their arguments as to the facts and the law, in writing, within the term granted to that effect, the court having reserved its decision until today, where the court, after considering the evidence in whole, as well as the arguments of the respective parties, and the law applicable to this case, makes the following findings:

14 I. That the complainant is a merchant doing business in the city of Mayaguez, and the defendant a corporation duly constituted and organized under the laws of Porto Rico and engaged in the manufacture of cane sugar, having also a factory established in one of the rural wards of the Municipality of Mayaguez.

II. That on or about August 4, 1914, plaintiff and defendant entered into a contract by telephone, by virtue of which the latter sold to the former 748 sacks of centrifugal sugar, second class, each sack weighing 252 pounds, at the price of $3.22½ per hundred weight, the said sugar being immediately placed at the disposal of the plaintiff, at the storehouse of the factory, situated in the ward of Sabanetas, of the Municipality of Mayaguez, to be delivered by the defendant to the plaintiff in the following manner: One hundred

and sixty sacks by railroad as soon as defendant received the order for delivery from the Royal Bank of Canada, Mayaguez branch, and the remainder during the week next to that of the date of the execution of this contract, and in cart-loads; it being agreed likewise by both parties that the value of said sugar—that is, the sum of six thousand and seventy-nine dollars ($6079)—should be previously deposited by plaintiff in said Bank, and at the disposal of the defendant, so that the latter could make the delivery of the sugar so sold.

III. That defendant on the said date sent to plaintiff the invoice regarding this negotiation, which document was received by the latter on the next day.

IV. That the said sugar was, upon the execution of the contract, pledged by the defendant to the aforesaid Bank by virtue of a private document, signed before a notary, under date prior to the execution of said contract of sale, and that defendant could not dispose of said article without previously paying its value or amount to the Bank.

V. That plaintiff upon the next day to the execution of the contract,—that is, on the 5th of August, 1914,—and without any reason therefor, by letter addressed to the defendant, informed it of his unwillingness to accept the condition as to the satisfaction of the price of said sugar in the manner agreed on in said contract.

15 VI. That in the same letter plaintiff proposed to the defendant that said sugar should be delivered to him, if it so desired, in one single day, without saying or proposing anything as to the manner in which he would pay its value.

VII. That defendant did not accept the new condition proposed by the plaintiff, as stated in the foregoing paragraph.

VIII. That defendant on August 6, 1914, informed the plaintiff, by letter sent to him on said date, that the above contract was terminated and rescinded, which was confirmed by letter of the 7th of the same month, the defendant having taken this resolution, inasmuch as plaintiff did not comply with the condition stipulated with regard to the payment.

IX. That plaintiff made no offer to defendant as to the satisfaction of the value of said sugar as agreed in said contract, nor did he offer to make a deposit, nor did he deposit the said value for the sugar while the aforesaid contract was continued in force by the defendant.

X. That on August 10 of the said year, 1914, and after plaintiff had notified the defendant of his repudiation of the manner of making the payment, and made a different proposition as to the manner of delivery of the article contracted for, it was that the said plaintiff attempted to deposit in the Royal Bank of Canada, Mayaguez branch, the price of said sugar in the sum agreed and by means of a check.

XI. The court likewise finds that in the course of the correspondence had between plaintiff and defendant by reason of the said contract, the latter wrote to the former on the 7th of the said month of August, 1914, a letter, wherein, after ratifying its agreement as to

the form of making the said payment for the sugar, as had been stipulated, and which is already stated, the defendant said:

"I am inclined to believe that your attitude today is rather an excuse for not complying with our contract, for the reason of the subsequent advance in the price of the sugar."

That this letter was written at the commercial office of the plaintiff by his stenographer, and in typewriting, following the instructions of the plaintiff, with the approval of the latter, and copied in the copybook of letters, which is carried in his office, by another employé.

16 XII. That once the said letter was so copied and signed by said clerk, it was placed on the desk of plaintiff, in his office, for examination, and subsequently put into an envelope and sealed, and mailed to the defendant.

XIII. That subsequent to the date of the said letter some friends of the president of said defendant corporation, Mr. Alfonso Valdés, when they met him, they teased him in connection with the transaction made with the plaintiff Quinones, by reason of which Mr. Valdés felt himself mortified and ashamed; but there is no proof to the effect that such persons, when this matter was spoken of, had been informed by Quinones of the said transaction, or that the latter had shown them the said letter.

XIV. We are also unable to find any proof that plaintiff, when he wrote the said letter, had the intention of causing damage to the defendant in its good name, nor that it had such effect, or that it was written with malice.

In view of these facts, and of the whole evidence and circumstances in this case, the court arrives at the following conclusions:

I. That plaintiff, Tomás Quinones, unduly violated and repudiated the contract he had with the defendant in refusing to comply with the stipulation made as to the payment in the manner stipulated by his letter of August 5, 1914.

II. That the proposal made in said letter to the defendant that the date of the delivery of the goods should be changed, constituted a proposal to modify the said contract, which was never accepted by the defendant.

III. That the attempted offer as to the deposit of the money made by the plaintiff in the Royal Bank of Canada, on August 10, 1914, after the contract had been violated and repudiated by him, and had been broken and rescinded by the defendant, could not produce, nor did it produce, any legal effect.

IV. That the violation and repudiation of the contract by the plaintiff, in the manner stated, justified the cancellation and rescission made by the defendant.

V. That by virtue of the foregoing facts and conclusions, plaintiff is estopped from claiming or recovering anything

17 from the defendant, and the complaint filed by the plaintiff should be dismissed, *as* it is hereby dismissed.

The court bases its conclusions upon the following legal precepts and authorities, which are considered applicable to this case, to wit:

"Revised Civil Code, secs. 1369, 1130, 1144, 1145, 1146, 1408

and 1067; 10 Manresa, pp. 315 to 326; Code of Commerce, sec. 339; 9 Cyc. 52; 8 Manresa, p. 633; Weaver v. Burr, 3 L. R. A. 94; Four Oil Co. v. United States Producers, 68 L. R. A. 226."

And with respect to the counterclaim made by defendant, wherein a claim for libel is made, the court arrives at the conclusion that, under our Law of Libel (Revised Statutes, secs. 567 to 574, both inclusive), and the jurisprudence of the Supreme Court, the letter containing the supposed libelous statement was written in the course of the ordinary business of the plaintiff, and that said publication was not written with malice and has caused no damage to the defendant, and therefore that the said counter-complaint should also be dismissed, *as* is hereby dismissed.

The court wishes to call attention to the fact that, in so far as — the action brought by the plaintiff other questions were raised by the parties in this case, it is unnecessary to decide them, inasmuch as the questions included in this opinion are sufficient by themselves to arrive *to* the foregoing conclusion; and as to the costs, expenses, disbursements and attorney's fees, the court is of opinion that they should be imposed, and are hereby imposed, upon the plaintiff.

For the foregoing reasons judgment should be rendered, and is hereby rendered, dismissing the complaint and counter-complaint presented in this case, to the effect that plaintiff recovers nothing from the defendant for the reasons stated in his complaint, and that defendant recovers nothing either from the plaintiff by virtue of its counter-complaint, and that plaintiff pays to the defendant the costs, expenses, disbursements and attorney's fees of the latter.

Given at Mayaguez, Porto Rico, on the 29th of May, 1915.

(Signed) CHARLES E. FOOTE,
District Judge.

18 *Appeal.*

To the Secretary of this Court and Attorney Feliu, Counsel of Corporation Defendant:

You are hereby notified that plaintiff, Tomás Quinones, has taken an appeal to the Supreme Court of Porto Rico from the Judgment rendered in this case by this District Court on the 29th of May, 1915, so far as by the said judgment the complaint for damages filed by the plaintiff, Tomás Quinones, is dismissed, with costs, expenses, disbursements and attorney's fees; and plaintiff likewise takes an appeal from that part of the judgment whereby the Ana María Sugar Co. has been relieved from paying costs, expenses, disbursements and attorney's fees, notwithstanding that its counter-complaint in damages for libel, filed in this case against Tomás Quinones, was dismissed.

(Signed) JORGE V. DOMINGUEZ,
JOSÉ SABATER,
Attorneys for Plaintiff and Counter-Plaintiff.

Mayaguez, June 19, 1915.

Served with copy of the foregoing notice of appeal today, June 19, 1915.

(Signed) LEOPOLDO FELIU,
Attorney for the Defendant and Counter-Complainant Corporation.

19 In the District Court of Mayaguez, Porto Rico.

No. 4754. Civil.

TOMÁS QUINONES

v.

ANA MARÍA SUGAR COMPANY.

Damages.

Statement of the Case.

Be it remembered, that on the 27th of April, 1915, this case was called for trial during the regular term of this court, Honorable Charles E. Foote, sitting as judge.

The parties appeared; the plaintiff through his counsel, José Sabater and Jorge V. Domínguez, and the corporation defendant by its attorney, Leopoldo Feliu.

Counsel for the plaintiff, before entering into the trial of the case, made the following motion:

"With respect to the sum of the claim for damages, we have sufficient proof to enable the court to consider this sum, but we think there is other proof which we have been unable to obtain, and it is the following: The facts referred to in the complaint took place in the month of August, it being necessary for us to show the average of the prices obtained in the New York market, it being somewhat difficult to find in Porto Rico a conclusive proof. We shall present sufficient proof, but should the court deem that the evidence we have presented is not sufficient to estimate these damages, then we pray the court to continue the case until other proof can be presented; the reason why we do not present it now is because it is a deposition that must be taken in New York. We are ready to go to trial, but if during the trial the court thinks that the evidence with respect to the estimation of these damages should not be sufficient, that the court continues the hearing of proofs for the introduction of this other evidence of a deposition taken in New York."

Counsel for defendant said:

"We oppose to this because we think there has been an ample opportunity to be prepared for this case, and besides we have
20 some doubt as to whether that evidence would be admissible or not. I think that if we begin to try the case, the court, at the conclusion of the evidence of the plaintiff, should not leave the case open for the introduction of any depositions."

The court ruled as follows:

"The motion is denied by the court in the manner in which it has been presented, as the court is of the opinion that it cannot during the trial manifest to the parties that it is not convinced, or that it requires additional proof as to some proof; that would be impossible for the court to say."

Counsel for plaintiff again said:

"Our intention is not to cure omissions in the evidence, but to show that the court could during these arguments make some calculations to determine the amount."

The Honorable Judge said:

"The court cannot enter into any such arrangements because it may result, as stated by the attorney, that without knowing the proof the court is unable to give any opinion as to that matter; it may be that the proof presented will be entirely insufficient, and the other evidence would be really to supply a proof that is lacking on the part of the plaintiff; the court therefore, overrules the motion."

Thereupon counsel for plaintiff made the following motion:

"Your Honor will grant us the right during the trial to renew our motion, the court reserving its right to deny it then or to deny it now?

The court ruled:

"I think parties should not go to trial with the idea of asking for a suspension thereof to allow the parties to file other proof whenever the opposite party makes opposition."

Counsel for plaintiff took an exception, alleging that the motion is based on Section 227 of the Code of Civil Procedure.

To prove the allegations of the complaint, counsel for the plaintiff introduced the following evidence:

Documentary and Oral Evidence of the Plaintiff.

21 (a) A certificate issued by the Secretary of Porto Rico, on the — of April, 1915, showing that the articles of incorporation were filed in his office.

Counsel for defendant said:

"Although we think this is not the certificate that should be brought here, however, we will admit it in evidence for what it is worth, but without admitting that it proves the incorporation."

Parole Evidence of the Plaintiff.

Statement under Oath of Alfonso Valdés.

ALFONSO VALDÉS appeared, and under oath, and answering to questions put by the attorney of the plaintiff, said:

I am a property owner and the president of the Ana María Sugar Company, the defendant in this suit.

I recognize the written letters which are shown to me, and ad-

dressed by the firm of Tomás Quinones to the Ana María Sugar Company, which were received by mail.

Counsel for defendant did not cross-examine.

Statement under Oath of Tomás Quinones.

The witness THOMAS QUINONES appeared, and under oath, and in answer to questions put by counsel for plaintiff, said:

I am fifty-six years old, a resident of Mayaguez and merchant doing business at Playa of Mayaguez, with an establishment open to the public. I am in the business ever since I was twenty years old—thirty-six years ago—and in business in Mayaguez since the year 1903, and continually and uninterruptedly since that date. And as such merchant I have been engaged in purchasing and selling sugar, and I do business in coffee and sugar since I entered into the business, with the purpose of speculating with it.

On or about the month of August, 1914, I entered into a negotiation of sugar with the Ana María Sugar Company, whose agent is Alfonso Valdés, with whom I dealt with and whom I know personally, without confounding him with another person.

22 Counsel for defendant said:

"Are we going to admit oral evidence upon the conditions of that business, there being some letters and notwithstanding that the complaint says it was made in writing?"

Counsel for complainant answered:

"Witness has not commenced to testify yet; what we intend is that the witness goes along explaining the transactions which were made aside from the letters; the witness may explain the matter to the court while we proceed to show him the letters."

The judge ruled:

"The witness may answer. Now, of course, the letters are a proof of the contract, if the contract was made by letters. He may proceed to explain, and then we will see if he can go ahead or not."

Counsel for the defendant took exception on the ground that the complaint itself shows, and therein it is alleged, that the contract was made by letters, and hence that the best evidence would be the letters.

The transaction to which I made reference began thus: On August 3 I called Mr. Valdés by telephone, to the Central, and they answered, "Valdés is not here; you might find him at the plant." I called Valdés at the plant, and there I found him. "Tell me, Mr. Valdés, have you the sugar which you offered me some days ago, or have you sold it?" "No, sir." "At what price would you sell it to me?" "At three twenty-five." "Mr. Valdés, that is the price that sugar has now in New York; I cannot pay you that price." "Oh, Mr. Quinones, but sugar will increase in price." "Tell me how much you have?" "Seven hundred and forty sacks, more or less." "If you want to take three dollars, I will buy it." "No, sir; three dollars is impossible." "What is the lowest rate that you would put for me

since I am not going to pay you the New York price here." "I shall give to you at three fifteen." "I will take it." I had but left the telephone on the desk when I was called again. "Mr. Quinones, *Mr. Quinones*, within one hour I shall confirm you that price."
23 "How is it; is not the business already done?" "But, Mr. Quinones, I have just arrived from the country; I am not very well acquainted with things. However, I shall confirm the transaction within one hour." "Very well." I ring off; the hour passed, and the day, and nothing else was said to me by him, and I therefore, considered the matter as already finished, because, as he did not ratify the transaction, it was something ended, which I did not consider any longer, although I was somewhat disgusted, as he did not even have the courtesy of calling me and telling me, Mr. Quinones, there is nothing said, or else I ratify the transaction. On the next day, at noon, I came to my house and I found Mr. Valdés on the sidewalk, at the store of Messrs. Grau, with several other friends.

At this state of the proceedings counsel for defendant asked that the testimony of the witness heretofore made be stricken from the record, inasmuch as no agreement had been made, and the court ruled that all incidents tending to illustrate the matter to the court were pertinent. Counsel for defendant took an exception.

The witness goes on testifying:—

When I passed by Mr. Grau's house, where he was with some other people, he made me certain signs, and I simply answered him with a bow of the head, because, indeed, I was not very pleased with his action, but I only moved my head and proceeded to my house; this was at two o'clock P. M., more or less, because it was after lunch. When I went down to the office the boy came and told me: "Somebody is calling you by the telephone." I took the telephone. "I am Don Tomás; who is that, Mr. Valdés? What do you want, Mr. Valdés?" "This morning, when you passed by, I made a sign to you, because I wanted to tell you that I was going to your house, but I was delayed there with my friends, Messrs. Grau, and you closed. When I saw you passing I noticed that the storehouse was closed, but I intended to go there." I said: "Yes; I see that you have many resolutions, Mr. Valdés; why do you say that to me?" "Because you told me that yesterday, and within one hour you would call me up, and I think from yesterday until
now it has rained much." "Oh, Mr. Quinones, excuse me,
24 I distracted myself with other things, but today I was really going." "And what about the sugar?" "Mr. Quinones, I really called you because I went to the Royal Bank, where I consulted things, and they advised me that it is not the proper time to sell, and, on the contrary, that if I had kept the sugar until now, I should continue doing so. However, I want to sell you the sugar; if you pay me three twenty-five I will give to you, which was the price I asked you." "How do you intend that I buy the same thing twice, if you have given me that sugar at three fifteen?" "Yes; but Don Tomás, the market is now better, and, in fact, these things

are natural for a person who desires to get the best price on his goods." I said: "Well, we must come to an understanding; what is it that you want—to sell the sugar?" "Yes, Don Tomás; but you must pay me three twenty-five." "No, sir; I do not pay you three twenty-five; as you want to make the transaction again, I will pay you five cents more." "No, Don Tomás; divide the balance and the sugar is yours. I must say you a thing: I do not want to make any railroad expenses in sending this sugar; I want to send it to you in my own carts." I said: "Well, we must make ourselves understood; all time has a limit. Up to what time are you going to be sending it?" "Don Tomás, in the remainder of this week and the next, so that I will be sending sugar to you until next week." I agreed with the proposition. Nothing else happened between us. Later, and fearing that something of the same kind might happen, I called him, and said: "Tell me, Mr. Valdés, what you want is not to make any expense; deliver to me the sugar that you have here in the storehouse; I shall convey the same without any expense on your part." "No, Don Tomás, I cannot give you from that sugar. That is the agreement we have made."

This was on the 4th of August of the year 1914.

By reason of the transaction, I had some correspondence with the Ana María Sugar Co., as it is my custom to confirm in writing any transaction that I make through telephone. And that is the practice of my house, where things are kept in order.

25 When I made the agreement as to that purchase of the sugar, I was informed that the kind of sugar which was to be delivered to me was the ordinary sugar in the market—good for consumption—centrifugated sugar—as Mr. Valdés had brought me a sample of sugar previously, and had told me: "Don Tomás, I have that beautiful sugar; I sell it to you." And it was for it that I asked him that day: "Did you sell the sugar which you offered me?" So that, when we spoke about that business, I had seen the sample; Mr. Valdés had it with him. He went to my house, and said: "I have that beautiful sugar for consumption," and, of course, I liked it.

On August 4, 1914, I confirmed the transaction I had made, and wrote a letter to the Ana María Sugar Company, which was signed by my attorney in fact.

Counsel for plaintiff showed the letter to the witness, to which his testimony refers, which was recognized by him and introduced in evidence, it being admitted by the court, without objection by the defendant, and marked "Exhibit B." The said letter, literally copied, is as follows, and, as all the others was sent by mail.

EXHIBIT B.

Mayaguez, August 4th, 1914.

Ana María Sugar, Inc., Mayaguez.

DEAR SIRS AND FRIENDS: The object of this is to confirm the purchase I have had the pleasure of making with you today in

our telephonic communication, of 740 (seven hundred and forty) sacks of centrifugal sugar, second kind, same quality as per sample sent, at price of $3.22½ per hundred weight, which you should deliver to me during all next week. I am very glad with this new transaction with you, and I remain,

Yours truly,

(Signed) TOMÁS QUINONES,
By A. G. MONEFELDT.

The witness goes on testifying:—

On the next day I received a letter from the defendant ratifying me the said transaction, but, to my surprise, fixing a condition.

The letter referred to is introduced in evidence and admitted by the court, without objection by counsel of defendant, and, literally copied, is as follows:—

26 EXHIBIT C.

(C) Mayaguez, August 4th, 1914.

Mr. Tomás Quinones, Mayaguez.

DEAR SIR AND FRIEND: We hereby ratify the sale we have made you of 748 sacks of sugar, second kind, weighing 252 pounds each sack, at price of $3.22.5 per 100 weight, which sugar is at your disposal at this Central, to be delivered to you during next week, and a wagon, with 100 sacks, which shall be dispatched as soon as we get the order from The Royal Bank of Canada, of this city. We also beg to enclose the corresponding invoice for the 748 sacks, which are valued at $6079, which sum must be deposited by you at The Royal Bank of Canada, aforesaid, to our account, to be able to make the delivery as agreed.

Yours truly,

(Signed) ANA MARIA SUGAR CO., INC.
A. VALDÉS, *President.*

The invoice to which the foregoing letter quoted under letter (C) refers, literally copied, is as follows:—

EXHIBIT D.

(D)

August 4th. To 748 sacks of sugar, second kind, weighing 252 pounds each sack, or a total of 188,496 pounds, at $3.22.5 per 100 weight..... $6079.00.

Mayaguez, P. R., August 4, 1914.

The witness goes on testifying:—

The foregoing letter does not exactly show the contract I made with Mr. Valdés as to the condition of the sugar, and other matters,

it is all right, but not as to the stipulations for payment; this was for me a thing entirely beyond this world. Everything is correct except the condition which was sought to be imposed upon me, that I should pay for the sugar before receiving it, and on that same day, the 5th, I answered by this letter.

The letter is offered without objection from the opposite party, and is admitted by the court. It is as follows:—

EXHIBIT E.

(E) "Mayaguez, August 5th, 1914.

Ana María Sugar Co., Mayaguez.

DEAR SIRS AND FRIENDS: Crossing with my letter of yesterday, which I confirm, we have been favored by your letter of the
27 same date enclosing bill for the lot of sugar bought. I agree with all except with the duty which you impose on me of paying for the article before receiving same. The delivery of the article in the manner stated was agreed to for your own convenience, but if you wish to deliver it in one single day it is the same to me.

I remain, Your friend,

(Signed) THOMÁS QUINONES,
Per A. G. MONEFELDT.

The witness proceeds, testifying:

To that letter I received the answer I now show you.

The following letter is introduced in evidence without objection. It is admitted and marked "Exhibit F," to wit:

EXHIBIT F.

(F) Mayaguez, August 6th, 1914.

Mr. Tomás Quinones, Mayaguez.

DEAR SIR AND FRIEND: Having been informed from the Royal Bank of Canada, of this city, that you have not delivered for our account the price of the sugar sold to you according to our letter of the 4th instant, without said requirement we cannot make the deliver of said sugar, under the conditions of our letter, we beg to inform you we have cancelled the transaction of sale, and therefore beg to ask you to return to us the invoice remitted covering the purchase. We regret this incident which prevents us from carrying into effect the transaction made between you and our President, and we remain,

Your friends,

(Signed) ANA MARÍA SUGAR CO., INC.,
Per VALLS, *Treasurer.*

The witness goes on to state:

To the letter of the 6th, just quoted, I answered on August 7, 1914, which I offer in evidence.

The letter of August 7, 1914, is introduced in evidence; admitted by the court without objection, and marked "Exhibit G." It is as follows:

EXHIBIT G.

(G) Mayaguez, P. R., August 7th, 1914.

Ana María Sugar Co., Inc., Mayaguez.

DEAR SIRS AND FRIENDS: I am surprised at the contents of your letter of the 6th which was received today, cancelling the pur-
28 chase I made you of a lot of sugar, second kind, in sacks weighing 252 pounds each, at $3.22½ per 100 weight, which was to be delivered during all next week and to be paid for in the ordinary manner and custom of the market unless any agreement to the contrary while the said article was being delivered, and therefore beg to inform you of my disagreement since you are under the duty to deliver me the article bought and immediately receive the money. The conditions as to the delivery were made to suit your own convenience, and if you wish that I pay you at once the whole price of the said sugar you may make the delivery in one single day. I am at a loss to understand why you make such demand in your letter of the 4th when nothing was said about it when the transaction was made, and I cannot conceive in any way that it is due to lack of confidence on your part since the sums previously advanced by this house to that Central and the information which you may receive from the Royal Bank of Canada as to the former, actual and future solvency of this house cannot serve as basis for the same; I rather believe that your attitude today is simply an excuse for not complying with our contract by reason of the increase subsequently obtained in the price of the article according to the information I have received from New York. I beg you to acknowledge receipt of this letter to determine what will be our future attitude, and I remain,

Yours truly,

(Signed) TOMÁS QUINONES,
By A. G. MONEFELDT.

The witness continues testifying:

I received an answer to the foregoing letter, Exhibit G, the said answer being the letter bearing date of August 7, 1914, which will be copied as "Exhibit H," coming in an envelope which, being abnormal, I have kept it and attached to the letter.

The letter referred to by the witness is offered in evidence and admitted without objection, and marked "Exhibit H," and, literally copied, is as follows:

EXHIBIT H.

(H) Mayaguez, P. R., August 7, 1914.

Mr. Tomás Quinones, Mayaguez, P. R.

DEAR SIR AND FRIEND: Crossed with our letter of the 6th instant we have received your letter of the 5th, informing us of your
29 conformity in all its parts with the purchase of the lot of 748 sacks of sugar, second kind, with the exception to the particular referring to make a deposit of the value of the invoice in the Royal Bank of Canada, of this city, on the day of the sale, which condition was thus stipulated with our President according to our confirmatory letter of the 4th instant. In answer to your said letter we simply beg to confirm ours of the 6th instant, cancelling the transaction of purchase of the said lot of sugar, as you have not complied with the agreement. We remain,

Yours,

(Signed) ANA MARÍA SUGAR CO., INC.,
Per VALLS, *Treasurer.*

Plaintiff introduced in evidence the referred to envelope, which is addressed as follows:

EXHIBIT I.

Mr. Tomás Quinones, Mayaguez, P. R.

On the back of said envelope is the seal of the post-office, from which it appears that the said envelope was marked in the post-office of Mayaguez, on the 8th of August, 1914, at 9 p. m., and this envelope was admitted in evidence and marked Exhibit I.

Plaintiff introduces in evidence, and is admitted by the court without objection, the letter which, literally copied, reads as follows:

EXHIBIT J.

(J) Mayaguez, P. R., August 8, 1914.

Mr. Tomás Quinones, Mayaguez, P. R.

DEAR SIR AND FRIEND: We have just been favored by your letter of the 7th, which was received after having mailed ours of the same date in answer to another from you. We are surprised at the contents of your letter, which we now answer, in which you explain the reasons you have considered for the cancellation and rescission of our preliminary agreement as to the purchase of the sugar, which was carried into effect. Our punctuality in business is sufficiently recognized by all the firms with which we have been dealing, and we cannot understand how is it that you imagine that the increase in the price of sugar may have compelled us to act in the manner we have reasonably taken in this matter, having, as it has been the case,

made sales under similar conditions to Messrs. Grau. You must remember that when this business was considered for the first
30 time by you and our President, by telephone, the latter spoke to you of the necessity that the sum for the sugar in question should be previously deposited by you in the Royal Bank of Canada, of this city, the payment in this manner being a prerequisite to the delivery of the article, and this transaction having been made in which the payment was to be made in the manner stated, we were, and we still are, entitled to rescind it for your noncompliance with the said prerequisite immediately. However, it was not until August 6, or three days after the settlement of the business, that we cancelled the same in view of the fact that you were not willing to fulfill our said prerequisite. We, therefore, ratify our action in this matter, which we have been compelled to adopt due to your fault only and with great reluctance on our part, as we never thought that a thing of this sort might happen between us.

Your friends,

(Signed) ANA MARÍA SUGAR CO., INC.
A. VALDES, *President.*

Plaintiff introduces in evidence the letter which is admitted by the court without objection, and marked "Exhibit K," which, literally copied, is as follows:

EXHIBIT K.

(K) Mayaguez, P. R., August 10, 1914.

Ana María Sugar Co., Inc., Mayaguez.

DEAR SIRS: In order that you do not find any pretext to avoid making the delivery of the sugar bought from you today, in the morning, I have deposited in the Royal Bank of Canada the value for the invoice rendered to me, subject, of course, to rectification according to weight shown by the sugar. Inasmuch as the said Bank refused to receive the said sum alleging that you instructed it to act in this manner, and since, I believe, that you are under the duty to deliver me the said sugar during this week as agreed, I inform you of this for proper effects. Although the solvency of this house, I repeat, is above any intentional distrust, the value of this sugar may be safely guaranteed in any of the Banks of this city.

Yours truly,

(Signed) TOMÁS QUINONES.

The witness continues testifying, answering to questions put by counsel for plaintiff:

I have not received the sugar I had bought, and I was not informed or advised that such sugar was at my disposal; I was
31 always told the contrary—that the contract had terminated; I have stated in my letters that I was willing to receive the sugar.

Then counsel for plaintiff asked:

"Have you had similar transactions in sugar with the Ana María Sugar Company at other occasions besides that to which you have made reference, and to which your correspondence refers?"

Counsel for defendant said:

"I object to this question because it is immaterial and impertinent. Is it the purpose to prove here, in a case where evidence has been offered tending to show a contract in a specific and fixed transaction, that at former occasions the parties have had other transactions?"

Counsel for plaintiff said:

"We think that in a contract of this kind referring to mercantile transactions we are entitled to show the custom of the market, not only because it is so provided in the Civil Code, which says that in commercial matters the custom of the market should be followed, but because it has also been alleged in the second paragraph of our complaint, and that part has not been stricken out by motion of the opposite party."

The judge rules:

"The question is admitted by the court; the question may be shown, and the former transactions between the same parties may also be shown."

Counsel for the defendant company took exception.

On other occasions I have had several negotiations with the Ana María Sugar Co. as to sugar purchases; the most recent one was last year, and by reason of the same there was similar correspondence as in this case; we confirming and they confirming,—that is, they have confirmed or not,—but I always have confirmed the dealing, and the transaction has been carried into execution; that identical transaction as to sugar took effect in the months of May, June and July, or, more or less, at the time when the transaction of this last year took place.

32 Counsel for complainant says:

"We also have summoned Mr. Valdés to bring some letters written by the plaintiff, Mr. Quinones, on the 5th, 7th and 10th of August."

The judge says:

"The court will admit this evidence, provided it is of the same nature, a purchase executed in the same manner; but if in the other contract it was expressly stipulated that the money was to be paid upon delivery of the sugar, then it would not be admissible; but if it is a purchase made in the same manner, and it was understood that the price was to be paid at the delivery of the sugar, then the court will admit it."

Counsel for plaintiff says:

"In that sense it is that we will present that evidence. Then I beg the court to require Mr. Valdés to hand us for presentation to the court the original letters addressed to him by the plaintiffs during said days."

Counsel for defendant said:

"If the copies are here we could admit them. Now, I desire to reserve my objection as to that evidence."

The judge rules:

"The court admits evidence of other transactions of the same kind, which have been carried in the same manner if other purchases of sugar were made in the same form as plaintiff says it was done,—only an offer and acceptation,—without mentioning any conditions of how the contract had been understood by the parties."

Counsel for plaintiff asks:

"Would the opposite party accept these copies?"

Counsel for defendant said:

"We have to file the following objection to the admission of this proof, in the first place, because it refers to acts too remote, and, in the second place, because it has not been shown that any transaction has been made, the defendant being under the same circumstances in which it was at the time when the transaction originating this action was made."

33 The judge rules:—

"The court upholds the objection; it does not appear from these letters what were the conditions of the sale; those are letters of ratification."

Counsel for plaintiff says:—

"What we are trying to show is, that last year, and nearly at the same date, plaintiff Quinones made a similar contract of sale of sugar."

The judge says:—

"But it was not so shown."

Counsel for plaintiff states:—

"I will present these letters so that the witness may explain the transaction; in that sense it is that I present them."

The judge says:—

"But you cannot introduce them in evidence yet."

Counsel for plaintiff replies:—

"I had presented them considering that the opposite party had already admitted the genuineness of these letters."

Counsel for defendant said:—

"We admit that—that the letters were written by Tomás Quinones to the Ana María."

Counsel for plaintiff states:—

"We proceed now to read these letters and to examine the witness as to said transaction."

The judge rules:—

"You may make the question."

Counsel for defendant alleges:—
"I want to make it clear that the examination of the witness is for the purpose of explaining that evidence."

Three copies from the letters are shown to the witness and marked exhibits L, M and N; they were acknowledged by the witness, and, replying to questions put by counsel for the plaintiff as to the said letters, he says:—

34 Those letters refer to a transaction of sugar consisting in the sale made to me by the Ana María Sugar Co. of a lot of sugar by telephone, equal to the one involved in this suit and which I confirmed. In the said letters the conditions as to price and delivery of the sugar were stipulated, and I received the said sugar, paid for its value after receiving it, and told them in my letter: "I have received the sugar, and in accordance and under the instructions given me by Mr. Valdés I have deposited in the bank the sum of ——."

Thereupon the judge says:—
"One thing is what the letter recites, and another is what the witness testifies, because what the letter says is not conclusive. Now, ask the witness when it was paid."

The witness goes on testifying:—
After the sugar was received and its weight was ascertained, I paid. In that transaction made in 1913, Mr. Valdés and Mr. Alfonso Valdés, his son, intervened, who is the person with whom I made the transaction last year, to which the letters refer.

Counsel for the defendant corporation admits that the copies of the letters presented agree with their originals, and therefore admits their genuineness, and they are introduced in evidence by counsel for plaintiff.

To new questions put by counsel for the defendant corporation the witness replied:—
I do not know whether the sugar to which these three letters refer was pledged. When these letters were written I do not know legally if it was the Ana María Sugar Company or Mr. Ramón Valdés; for me they are the same.

I do not know if the company was already incorporated; I judge that the manager of the Central Ana María was Mr. Ramón Valdés, and his son, Mr. Alfonso Valdés, accompanied him.

Counsel for defendant objects to the admission of these three letters, as they relate to a transaction made at a very remote date; in the second place, because it was carried into execution
35 under entirely different conditions to those existing when the transaction which is the object of this suit was made, and, in the third place, because they are letters addressed to the Central Ana María, which was being administrated by Mr. Ramón Valdés, and not by Mr. Alfonso Valdés, who is now here in this action.

The court sustains the objection for the same reasons as alleged by the party.

Counsel for plaintiff took exception. The letters were marked exhibits L, M and N, which, literally copied, read as follows:—

EXHIBIT L.

Mayaguez, P. R., June 7, 1913.

Central Ana María, Mayaguez.

DEAR SIRS AND FRIENDS: I take pleasure in writing you today to confirm the purchase I made you today through telephone of (300) sacks of centrifugal sugar, second kind, according to the last sample shown to me by Mr. Ramón, at the rate of $3.15 placed here on sacks of 252 pounds brute weight, to be delivered to me in carts at your convenience. I am very glad to have made this transaction with you without any difficulty, and I remain,

Your friend,

(Signed) TOMÁS QUINONES,
By A. G. MONEFELDT.

EXHIBIT M.

(M) Mayaguez, P. R., June 28, 1913.

Central Ana María, Mayaguez.

DEAR SIRS AND FRIENDS: I acknowledge the receipt of your letter of yesterday, which has been read. As we informed yesterday to Mr. Valdés, we agree as to the quantity of sugar received whether they are 320 sacks having found the error incurred for which I want to be excused, and it pleases me to tell you that, following your instructions, we have deposited today at The Commercial Bank of Porto Rico, and for account, $2381.40, in full payment of your bill for the 300 sacks of sugar that I owe you. With respect to the remaining 20 sacks, I said in my letter of yesterday I was willing to take them at $3.05, which was the price asked by Mr. Alfonso Valdés. You may, therefore, send me the corresponding bill. I remain,

Your friend,

(Signed) TOMÁS QUINONES,
Per A. G. MONEFELDT.

36 EXHIBIT N.

(N) Mayaguez, P. R., June 30, 1913.

Central Ana María, Mayaguez.

DEAR SIRS AND FRIENDS: From Mr. Alfonso Valdés of your firm I received the bill for the 20 sacks of sugar amounting to $153.72, and I wish to inform you that under the instructions given me by said gentleman today I have deposited in the Commercial Bank of Porto Rico to your account the sum of $153.72 in payment of your invoice. I remain,

Your friend,

(Signed) TOMÁS QUINONES,
Per A. G. MONEFELDT.

The witness continues declaring, in answer to questions put by counsel for plaintiff, that:—

I buy and sell sugar here in Mayaguez since the year 1903, and I also did it at San Germán. With respect to the purchase and sale of sugar at the Mayaguez market, I have concerted many transactions with the Ana María and others. I have always made purchases during the period in which it is customary to buy sugar.

The custom in the market as to these mercantile negotiations in sugar is the same as that of coffee and other articles; a person comes, and says, "I sell you 200 sacks of coffee"; I buy them. "When will you deliver them to me?" "I shall deliver them in eight within days." Some firms are in the habit of signing a contract, others not; and then the man comes, delivers his article, and sometimes the seller is a known person. "Say, you will give me one thousand dollars on account." There you have so much. I have bought sugar from persons who have said to me, "Say, please give me five thousand dollars on account of that sugar," and I have given him the money.

The custom is to pay after receiving the article.

The custom is to make the agreement of sale without saying anything as to the delivery of the price, because whoever goes to the Playa already knows that he will sell the article and get the money, so that nobody knows that the sale will be on credit; nothing of the kind. "I sell you 200 sacks of sugar at three dollars." "All right."

As a general rule, the payment for the article is made on the receipt of same, when the quality and weight of the good- is seen, because if I buy a lot of sugar it may happen that all is not
37 the same; some sacks may come that cannot be received, nor the weight thereof, because they say sacks of 250 pounds, but the sack may weigh less; therefore the value for a lot of sugar is known when it is delivered, and it is then that payment is made.

When the sugar is delivered some sellers send a bill or invoice, but others do not, and the person who receives the article knows the number of sacks which are sent to him, because he keeps a memorandum. I buy 500 sacks of sugar, and while they are being delivered in my establishment the clerk is taking a note thereof, who sends a memorandum to the bookkeeper, and then the bookkeeper makes the entry; the person sending the article also sends a bill or statement, where the following appears: I send so many sacks with such weight, and then it is compared upon coming in the house, and signs the receipt, which is handed to the cartman or railroad, the payment being made as customary, when the total amount is known, when the weight and quality of the article is fixed. How can I know the total amount? Imagine that I buy 1000 sacks of sugar, and that they may send me 100 which are not in good condition, which I refuse to accept, or that they send me other 100 sacks which are incomplete.

So that the custom in the market is to pay after the article is received.

With respect to purchase of the sugar, to which this case refers, with the Ana María Sugar Company, I made no agreement with

Mr. Valdés, nor with any other representative of the defendant, that payment for the sugar would be made before receiving same, and I never make any such agreement with anybody.

At the moment of the purchase of the sugar which was offered to me for sale by Mr. Valdés, as agent of the Ana María Sugar Company, I had no information that the said sugar was pledged or encumbered in any manner by any person. I have no means of knowing it. He does not know that we who are at the Playa are, more or less, acquainted with the business. At the moment of the purchase of the sugar I was not informed by Mr. Valdés that the said sugar was pledged.

38 Cross-examined by counsel for the defendant, the witness answered:

I have the idea that the letter written by the Ana María Sugar Company, on the 4th of August, addressed to me and marked "Exhibit C," was received by me between 11 and 12 a. m., of the 5th, and together with it I received the invoice, marked "Exhibit D," for the value of the sugar lot object of this business.

The letter of August 6, 1914, from Ana María Sugar Company, which was written by Mr. Valdés, addressed to me and marked "Exhibit F," wherein I was informed of the cancellation of the business made, ought to have been regularly received on the next day.

As to the letter of the 7th, the irregularity consists in that it is written on the 7th, and, as appears from the envelope, it was mailed on the 8th, at 9 p. m., as shown from the seal of the post office, and came to my hands on the 10th, as shown by the note taken by my correspondent who receives the mail; the note is not put by me.

I am not sure as to whether that letter reached there on the 10th. I know that it contained some irregularity, because it is impossible that a letter which was written on the 7th bears the seal of August 8th, at 9 p. m., and that is the irregularity that I observe; it may have been mailed, but it is an irregularity. So that all which called my attention in this is, that the letter was dated August the 7th, and mailed, according to the seal of the post office, on August the 8th, at 9 p. m., and that, according to the note put there by my correspondent, says: "Received and C." which means answered. I notice that the number is corrected; the number 9 was written and then number 10. I have not given it importance. When I presented the envelope I said: "Here is some irregularity, and now I see it." The letter was written on the 7th, picked up at the post office on the 8th, at 9 p. m. That letter probably came to my hand on the 9th or 10th, and may have come on the 9th. When I received this letter of the 7th I had already received that of the 4th from Central Ana María; on the 5th I had already received that of the 4th of Central Ana María.

39 The invoice sent with the letter of the 4th, marked "Exhibit C," was not returned to the Central Ana María, and it is the same which was presented in evidence. Upon closing my establishment all correspondence is put in a mail box, near the storehouse, so that the letter I wrote on the 4th to the Ana María Sugar Com-

pany, marked "Exhibit P," must have been put in the mail box on the same evening when it was written.

I understand that Ana María Sugar Company has its offices at the Central, but I think that the letters for Ana María Sugar Company are sent here; but I know that the office of the Central is at the factory, in the country, in one of the rural wards of Mayagüez, very near here.

When I spoke for the first time by telephone to Alfonso Valdés was while he was at the Central, but when we first attempted to make the transaction he was here, as I have said. He called me from the Central on August 4, 1914, when the transaction was settled. I remember it was he who called me, and he commenced by excusing himself for not calling me the day before.

I may explain the reason why I wrote on August 10th to the Ana María Sugar Company the letter marked "Exhibit K," wherein I said that in order that the Central could not put any pretext for not making the delivery of the sugar, today, in the morning, I deposited at the Royal Bank of Canada, of this city, the value for the invoice rendered, which shall be subject to rectification according to weight shown by the sugar. And why you did not say the same thing to the Central upon receiving its letter on the 4th? I cannot answer that very easily; because I, of course, considered that as an offense, because if I had been told, Mr. Tomás, I cannot sell that sugar unless it is under this condition. I could have agreed or not to the transaction, but if that is said without making any such agreement, and in a letter, it is a slap that I almost received, and it was a surprise for me to tell me any such thing, and in such a manner, without even telling me, excuse me, I am compelled to do it, but without anything having been agreed; so, naturally, how could I consent to it now?

And later I consulted my attorney, to whom I said: Say, Counsel, this and this happens to me. He, of course, gave me some advises, with which I was pleased—specially to show my belief to the fact that the sugar would not be delivered to me even if I paid it with diamonds.

I felt disgusted upon receiving the letter of the 4th, and did not go to make the deposit, because no agreement had been made as to the same; and I could not tolerate Mr. Valdés a condition that was not true, because if I owed anything to Mr. Valdés, if Mr. Valdés should have commenced by saying, I cannot sell you unless in such conditions, and I had entered in the business, then I should have known what duties I had contracted, but it was not so; the transaction of sugar was made, and absolutely nothing was said to me.

In my letter of the 7th to the Ana María Sugar Company, marked "Exhibit J," I said that I rather thought that conduct was a trick played on me, and due to the increase in the price of the sugar.

On the 4th, when I made that contract, the price of the sugar in the United States, according to my information, was $3.25 or $3.26; on the next day, the 5th, and after an interview with the Royal Bank of Canada, I learned that sugar had increased somewhat, and there was a tendency to increase, and that very day, the 5th, I was speaking to Mr. Hiltz upon the matter. When I received on the fifth the

letter, I, of course—at first when I saw that—I thought it was a mistake of Mr. Valdés', which would have been easy for me, if I had seen him, to ask him for a satisfactory explanation, but when I was molested, and the thing came to be worse, was at about three o'clock in the afternoon, of the 5th, that my attorney in fact said: You must see what the Royal Bank says, that if the money is not delivered to it today it will not be received tomorrow. Think of it! The letter was sufficient for any man, no matter how little nerves he has, to be molested. Then I rang the telephone, and called Mr. Valdés to ask him for an explanation of the letter and of what just had been told by the Royal; then Vals replied, "Mr. Valdés is there?" "Mr. Valdés is not here, Don Tomás; Mr. Valdés is in San Juan." "Tell me, Vals, will you explain me this: I received a letter in this sense, and now the Royal informs me that if I do not give that
41 money now they will not receive it tomorrow." He says: "Don Tomás, I do not know anything of that; this is a matter of Mr. Valdés; the only thing I know is that the Bank has informed me not to deliver the sugar." You must think, I was still more molested. I took the automobile and went to Mr. Hiltz; I said: "Say, Mr. Hiltz, do me the favor, I have received this letter and the Ana Maria says, 'What is the matter?'" "Have you not said anything to it?" "No, sir; no." "Will you let me use the telephone?" "Yes, sir." I rang the telephone and called Mr. Vals again. "Say, Mr. Vals, will you repeat what you told me a little while ago, as I did not understand you very well?" He said: "That I do not send the sugar, because I have received instructions from the Royal Bank not to deliver same." "Mr. Vals, I am here in the offices of the Royal Bank; the manager is at my side, and he will deny that he made to you said statement; that that is not true." This was truly very strong, but I could not help acting so at the moment, as I was somewhat nervous. Then I said to Mr. Hiltz: "Do me the favor," and then Mr. Hiltz began to talk in English to Mr. Vals. I did not understand what they said, because, although I read a little English, do not understand it; and while I did not know what they said, Mr. Hiltz, after finishing the conversation, said to me: "Mr. Quinones, Mr. Valdés will return from San Juan tomorrow; I will speak to him. Mr. Quinones, do not bother yourself. "Good-bye, Mr. Hiltz." "Good-bye, Mr. Quinones." This was in the afternoon of the fifth when I was informed that the Bank said that the sugar should not be delivered to me. On the fifth, Mr. Hiltz himself, speaking to me, said that the sugar had been increased a little. On that day I was not informed at the Bank that the sugar was pledged; I did not ask it to the Bank. Afterwards we have spoken to Mr. Hiltz, and never have asked about that; neither would he tell it to me; but I understood that some business were going on with them. I do not know if it was of any pledge, or anything else, but the Bank never has said to me I have that pledged. On the 5th I did not think of asking whether the sugar was pledged. I asked Mr. Valdés—I had forgotten this detail—"Is the sugar yours or of the Bank?" and he answered: "The sugar is mine." I did not
42 ask Mr. Hiltz if the sugar was pledged, nor did I go to find

out that with Mr. Hiltz, but simply to know the reason why the sugar was not delivered to me. On the 6th of August, 1914, I was not sure as to the price of the sugar; the only person who then received cablegrams was the Royal Bank; but the movement in the sugar commenced from the 5th to the 6th, and I did not receive cables directly.

With respect to the sugar which is the object of this litigation, when I received the letter from the Ana Maria informing me that the transaction had been cancelled, I immediately answered. I did not buy any other similar lot of sugar at the market at that time; neither I took any steps to buy the same. I think there was no sugar at the market. I never take any steps to buy; they come to me to sell, and I buy; I look for it only when I need it.

Answering to questions put by the plaintiff, he replied:

With regard to that conversation with Mr. Valdés, when he said that the Royal Bank has advised him not to sell, I asked him, "But is the sugar yours, or is it of the Royal Bank?" and he answered, "No; the sugar is mine."

As to the sugar object of this litigation, the Bank always has said to me that it has no interest whatever in the purchase made, and further said that it did not wish to have any interest at all, as it appears from the letter written by said Bank to me, answering my letter, where I asked that the telephone should be confirmed, which letter I received from the Bank, and I recognize the signature of Mr. Hiltz as the manager.

I was molested by the first paragraph of the letter I received on August 4, 1914, from Ana Maria Sugar Company, in which it is said that the said sugar is at my disposal at said Central for partial deliveries, etc., and I was molested because I took it as if they were doubtful as to my solvency, although I would not have assented to it, because that was not agreed, nor anything of the kind. I read the letter in all its particulars.

43 EXHIBIT O.

Counsel for plaintiff introduces in evidence the public deed No. 114, executed in this city on August 10, 1914, before Notary Juan Eugenio Geigel, showing that the Bank had been instructed as to the facts stated in the ninth paragraph of the complaint, where the value of the invoice for the sugar was to be deposited at the disposal of the defendant, Ana Maria Sugar Company.

Counsel for defendant objected to the admission of that deed, in the first place, because the only way in which it could have been shown here that Mr. Quinones was a debtor who complied with his obligation in default of the payment of the sum claimed or of the amount of the value of the sugar would have been the deposit made in the manner provided in the Civil Code; in the second place, we object to said admission, because the offer to make the deposit made on August 10, 1914, is subsequent to the day on which the transaction which is to have been made between defendant and plaintiff had been cancelled and terminated; and also we object to the ad

mission of said evidence according to the law, and it appearing from the evidence presented by the plaintiff himself that the sugar was since August the 4th at the disposal of the plaintiff, from that day he was compelled to pay the same under the Code of Commerce.

Counsel for plaintiff said:

"We present that tender and the deposit with the purpose, as has been stated in the letter of the 10th, in order to avoid any pretext on the part of the defendant, as we still were within the period of the contract; the sugar was to be delivered between the 5th and 15th of August, 1914, and since the defendant company, even after making the contract, claimed that it was a prerequisite that of the payment in advance, without any agreement to that effect, according to our theory, we then went to the Bank to make the deposit of the total value of the invoice, within the term in which the delivery should be made in order to avoid any pretext on the part of the defendant; that is a notarial act which is within the Civil Code, and we think that deposits may be judicially made before the courts and also by notarial act; it is an offer of making the deposit, of delivering a check."

44 And the court admitted the evidence for any value it might have because all becomes part of one single transaction; counsel for defendant took exception on the ground that the said document is not admissible in evidence, as it tends to show an offer of payment made to a third person.

Statement Under Oath of Witness H. Hiltz.

The witness H. HILTZ appears, and under oath, and answering to questions put by the plaintiff, says:

I recognize the authenticity of the check of $6079 issued by the complainant, Tomás Quinones, through his agent, A. Monefeldt, and to which the aforesaid deed, marked "Exhibit O," refers to, which check is marked "Exhibit P, which is admitted by the court and, literally copied, is as follows:

EXHIBIT P.

(P) No. 425.

Mayaguez, Porto Rico, August 10, 1914.

Branch of The Royal Bank of Canada:

Let it be paid to yourself or bearer the sum of six thousand and seventy-nine dollars ($6079).

(Signed) TOMÁS QUINONES,
By A. G. MONEFELDT.

Counsel for defendant took exception from the ruling of the court, making the same objection as to the check as the one made with regard to the deed offered in evidence, for the same reasons; and as to the letter here presented we make the same objection we filed to the first which was presented and signed by Mr. Hiltz,—that is, that

the letter refers to a matter which is entirely new and immaterial in this litigation.

Counsel for the plaintiff offer in evidence the letter of the Royal Bank acknowledging receipt of the check, which is presented in evidence as Exhibit Q, which, literally copied, reads:

EXHIBIT Q.

(Q) Mayaguez, P. R., August 10, 1915.

Mr. Tomás Quinones, Mayaguez, P. R.

DEAR SIR: We acknowledge receipt of your favor of the 10 instant remitting check No. 426 to our favor for $6079.00, to the account of the Ana María Sugar Co., Inc., to cover value of invoice of the 4th of August per 748 sacks of sugar, which we return with instructions received from the Ana María Sugar Co., Inc. At the same time we inform you that for a better explanation of our action you must refer to the Ana María Sugar Co., Inc. Without anything else to say.

We remain yours,

H. HILTZ, *Manager.*

At this stage counsel for plaintiff made the following statement to the court:

"We have here an information furnished by the Bank of Canada and signed by Mr. Hiltz himself as to the official quotations of the sugar market of New York during the month of August, 1914, when these transactions were made, containing the average price for the first fifteen days, the second fifteen days and then the whole month. I would like to call Mr. Hiltz before presenting it, to see if the defendant has no objection in accepting this as an information given by the Bank itself, and as genuine the signature put under the letter."

Counsel for defendant stated:

"We admit that this is the signature of Mr. Hiltz. Now, as to the admissibility of the document, we have to file an objection because of its contents. Your Honor will see that these are sugar prices at the market of New York during the first part of the month of August and the second part, and we insist here, in this case, that even granting all the advantage to the plaintiff, and assuming he had a right to recover anything from us, if he were entitled to recover anything, as damages, it would be the price in Mayaguez on the day on which the contract was violated, assuming it was violated, by us, on the day on which the transaction was cancelled, on August 6th, but never the price for the sugar in New York, nor either the average at given dates."

The honorable judge rules:

"The court will admit that kind of evidence; afterwards, as stated, with respect to other evidence that has been admitted, comes the legal question for that reason that no prejudice will be suffered by the party, because the information is admitted during the whole

month of August, if then the court comes to the conclusion, in case it is so decided, that the price at a given day is what controls."

Counsel for defendant alleges:

"We have a further ground of objection; we also have to object that, as it would tend to show a speculative damage, which complainant never would be entitled to recover."

46 The judge rules:

"The court will admit evidence of that and then hear the parties as to the legal question."

Counsel for defendant took exception on the ground that the evidence is inadmissible, as it tends to show the sugar prices at the New York market; and, further, because it tends to show the prices at given date, and not on the day on which the contract was violated, or when the alleged or pretended violation of the contract took effect, and for the additional reason that plaintiff is only entitled to recover in this case the material damages which might have been caused him in case the court arrives at the conclusion that there was a violation of the contract which existed in this case.

The judge rules:

"The court admits the evidence in this sense, and then will consider its weight. The court does not wish to decide that if plaintiff should b. successful in this action he would be entitled to a definite sum for damages, according to the price, but will admit the evidence and then will decide the other question; for instance, should the court rule that plaintiff is entitled to a compensation, then the other question should be decided—the total sum—whether it would have to be considered the average by fifteen days of a definite day, of the day when the contract was cancelled by the defendant."

Counsel for plaintiff only admits the authenticity of the signature put on that document, but not that the said prices therein are the prices quoted in New York.

Counsel for plaintiff presents, and is marked "Exhibit R," the deposition of witness Arturo Bravo, which in this case was taken before Notary Francisco de la Torre, on April 23, 1915, in the city of San Juan; both parties having stipulated that the objections made by counsel for the defendant when it was taken be decided by the court while it is read.

Counsel for plaintiff reads the deposition, which is as follows:

Exhibit R.

Deposition of Arturo Bravo, given before me, at my office in the city of San Juan, Porto Rico, on April 23, 1915, by
47 reason of attached requirement and of the oral stipulation which in this act, and before me, is made by the parties by their respective counsel, Jorge Dominguez, for the plaintiff, and Leopoldo Feliú, for the defendant, to be presented by the plaintiff in an action pending in the District Court aforesaid and wherein Tomás Quinones is plaintiff and Ana María Sugar Company defendant:

The said witness, having first been duly sworn with respect to said action, and answering to the oral questions made by said Jorge V. Dominguez in the name of the plaintiff, testified as follows:

Q. What is your name and surname, age, residence and occupation?

A. My name is Arturo Bravo; I am fifty-one years old, a resident of this city, and I am the secretary of the Insular Chamber of Commerce of Porto Rico.

Q. Have you, as such Secretary of the Insular Chamber of Commerce of Porto Rico, issued under date of January 23, 1915, the certificate, which, literally copied, reads:

"The undersigned secretary certifies: That according to the data of my office the quotations for each one hundred pounds which existed in the New York market during each working day corresponding to the month of August last (1914), for centrifugal sugar of 96 degrees of polarization, were thus referred to below, purchases and sales having been made in the cases where the word 'sale' goes after the price.

"I also certify that the calculation or average which is customary to do with the purchasers of sugar in Porto Rico for commission expenses until the article is placed at the side of the boat in New York, is of twenty cents per 100 weight, so that the equivalent of the value in this island is that of the prices in New York, which are given below, after deducting this twenty cents.

August	3rd.	$3.45		Sale.
	4th.	3.51		
		3.525	Average at $3.518.	Sale.
	5th.	3.525		
	6th.	4.01		Sale.
		4.14	Average at $4.14.	Sale.
		4.26		Sale.
48	7th.	4.26		Sale.
	10th.	4.92		Sale.
		5.02	Average at $4.97.	Sale.
	11th.	5.14		Sale.
		5.25	Average at $5.22.	Sale.
		5.27		Sale.
	12th.	5.88	Average at $5.95.	Sale.
		6.02		Sale.
	13th.	6.52		Sale.
	14th.	6.52		Sale.
	17th.	6.52		Sale.
	18th.	6.52		Sale.
	19th.	6.33		Sale.
		6.27	Average at $6.30	Sale.
	20th.	6.00		
	21st.	6.00		
	24th.	6.00		
	25th.	5.77		Sale.
	26th.	5.77		
	27th.	6.02		Sale.
	28th.	6.02		Sale.
	31st.	6.02		Sale.

Average of the month, $5.477.

"And at the request of Mr. Tomás Quinones, of Mayaguez, I issue this certificate, at San Juan, Porto Rico, this twenty-third day of January, 1915.

(Signed) ARTURO BRAVO."

Defendant asked that the foregoing question be stricken out, and objected to the same, because it is a leading question, immaterial and impertinent, and because it tends to obtain an answer from the witness upon an immaterial and impertinent fact; if there is better proof than the one furnished by the witness with his testimony, the said evidence must be brought.

A. Yes sir.

The judge rules:

"The witness is testifying as secretary as to some data obtained in his office; the court dismisses the objection."

Counsel for defendant took exception.

Q. Can you answer that said quotations are correct, and were those in force at the market on said dates?

Defendant objected to this question on the ground that no proper showing has been duly made, first, as to the qualifications of
49 the witness to testify upon the facts included in such a question, and because the said question refers to an immaterial and impertinent fact in this case.

The objection is overruled by the court, and counsel for defendant excepted.

A. The way in which I have obtained the information finds my entire confidence, and I have reason to believe that those were the prices which controlled the transactions at the New York Market during the said month.

The defendant asks that this answer be stricken out, as it is not a direct answer to the question propounded. "For not being responsive."

The court sustains the objection and rules that the answer be stricken out, and counsel for plaintiff takes exception.

Q. What is the origin of those quotations and information?

A. They have been given to me by the firm of Willet & Gray, of New York, which is a firm of good reputation all over the world, at the sugar centers, which I consulted through the Government of Washington, on different occasions, whenever the matter in question has been as to any information regarding the sugar market.

The defendant asks for the elimination of the foregoing answer, as it is hearsay evidence, and, further, because it does not appear that the origin of the information testified to by the witness is a sugar centre; and, further, because the said information does not refer to the prices and existing quotations in this island at the dates or time when it is alleged the contract object of this litigation was made.

The court admitted the answer, and counsel for defendant took exception.

Q. Do you know or can you state anything else tending to promote justice between the parties? If so, please answer, in an ample and particular manner, as if the question was specially put to you.

A. I do not know any other fact to help justice.

Cross-examined by counsel for defendant, the witness testified as follows:

Q. Is the house of Willet & Gray a private commercial firm or a Government public office?

A. It is a private office, as far as I know.

50 Q. Did you say that this house was consulted by the Government of Washington as to some data concerning the sugar market? How do you know that?

A. I read it in the American papers.

Q. Is the price stated by you in the foregoing certificate of this deposition the one computed by yourself in connection with the New York and San Juan markets?

A. I confined to certify only the *facts* controlling at the New York market during the month alluded to in the certificate.

Q. So that the prices shown by the certificate are those which were fixed at that time in New York exclusively?

A. Those which I have given are those of New York.

(Signed) ARTURO BRAVO.

I, Francisco de la Torre, Notary Public of Porto Rico, with an office opened in the city of San Juan, of said island, hereby certify: That the foregoing deposition was taken before me, at my office, in the said city and island, on the twenty-third day of April, 1915, at 3 P. M.; that it was taken at the request of the plaintiff through oral questions; that it was made in writing by Gustavo J. Gomez, who has no interest in this matter, and in my presence and following my instructions; that it was taken for use in this action, wherein Tomás Quinones is plaintiff and Ana María Sugar Company, Incorporated, defendant, pending in the District Court for the Judicial District of Mayaguez, and that the reasons which existed for taking this deposition were that the *the* said witness was a material and necessary witness for the plaintiff, and resides in the city of San Juan, and that between said city of San Juan and the city of Mayaguez, where the District Court is located, there are more than thirty miles distance; that the defendant, through his attorney, Leopoldo Felitú, was present when this deposition was taken; that the said witness before being examined offered under oath to tell the truth, and nothing but the truth, with respect to the said action, and then the said deposition was then carefully read *do* deponent, who then subscribed it personally.

(Signed) FRANCISCO DE LA TORRE,
Notary Public.

Counsel for defendant thereupon requested from the court that the entire testimony of the witness Arturo Bravo be stricken out from the record, inasmuch as it is shown by the witness himself that this is hearsay evidence on his part.

The court overruled the objection, it being of the opinion that to prove a thing of this kind, like the price of an article, as sugar or any other article which is of general knowledge, it is unnecessary to resort to the Government to obtain the data, which may be obtained in different manners; and the court deems that it is admissible.

Statement under Oath of Otto Ohrt.

The witness OTTO OHRT appears, and, answering questions put by counsel for plaintiff, said:—

I am the manager and since 1911 I am in charge of the firm Fritze, Lundt & Co., Successors, with office at San Juan and Ponce, the office of Mayaguez doing work in connection with the others in the island; before that time I was an employe and then attorney in fact of the firm for more than ten or fifteen years.

The firm Fritze, Lundt & Co. is engaged in the business of exporta-

tion and importation, commissions and agencies, purchase and sale of sugar, and for that reason I have had occasion to intervene in sugar negotiations made by my firm, intervening personally and directly.

I am aware of the custom at the Mayaguez market with respect to the purchase and sale of sugar. When no express stipulation is made in a contract of purchase of sugar as to the manner in which the price should be paid, it is understood at the Mayaguez market that payment must be made after the article is delivered.

If nothing is said as to the payment of the price, it is understood that payment will be made after the delivery. Now, I know that sugar transactions are made where money is to be paid in advance, or part of same, but it should be stipulated upon closing the business; but if nothing is said, it is understood that the merchant makes the payment upon the delivery of the article, and I can assure that such is the general custom at the market, in my opinion, in view of my experience and familiarity I have in the sugar business in
52 Porto Rico. My firm has quotations during the sugar crop, which I receive from San Juan by cable from New York.

Counsel for defendant objects that any testimony be given as to the quotations at the market in New York; the court dismisses the objection and counsel for defendant excepts.

Counsel for plaintiff asks:—

"How is the sugar business carried on in Porto Rico, which is the market controlling for determining or fixing the sugar price in Porto Rico?"

The witness answers:—

"I think that to answer this question a distinction should be made as to whether the question refers to sugar transactions for exportation or for consumption."

Counsel for plaintiff says:—

"For exportation."

Counsel for defendant alleges:—

"I object to that question; nothing has been proven here as to the fact that Tomás Quiñones desires that sugar for exportation."

Counsel for plaintiff says:—

"But it was shown that he wanted it for resale."

The judge rules:—

"Both things may be asked."

Counsel for defendant took exceptions."

Different methods are followed in sugar transactions for exportation, either by fixing a definite price which is agreed to at the moment when the business is made, or else transactions are made—for instance, for business during some time, it is said: The price is liquidated on the average fixed at a certain date, for the month or part of the month, from which a portion is deducted for freight expenses, etc., and when sales are made in cash here for immediate delivery, the prices sometimes depend on the agreement made between the purchaser and the seller, but each receives for his own guide

information from the New York market, which is the most important. Sugar transactions in Porto Rico are governed by the
New York market, which is the one regulating ..,—the
53 market which regulates the sugar transactions in the Island of Porto Rico. The custom exists at the market of making discounts on the prices controlling in New York, because if sugar is worth so much in New York, here it is worth less, because a reduction must be made on the freight and other expenses of insurance and to put it on board; that said discount varies. If it is f. o. b., sometimes it is twenty cents, more or less, for exportation; when it is for consumption the reduction sometimes is less and sometimes the same price controlling in New York is paid; after the crop, for instance, when there is little sugar, the same price is paid here as that controlling in New York.

The discount for expenses between the purchaser and the seller is conventional. In August, 1914, the least discount made in sugar transactions is from sixteen to seventeen cents, and the highest that I know is twenty-five cents, put on board. Now, if it is delivered on land, the discount has to be greater.

The firm Fritze, Lundt, which I represent, is an important purchaser of sugar in Porto Rico, and follows the quotations which are received daily from New York.

The discount on the aforesaid prices has never exceeded twenty-five cents as maximum or fifteen cents as the minimum.

The sugar sales in Porto Rico have been following the New York market for at least since the American occupation—since the change in sovereignty it follows the New York and New Orleans markets.

Answering to questions put by counsel for defendant, the witness says:—

As to the sugar bought for consumption and that which is bought for exportation, price is always conventional; sometimes more is paid for sugar for consumption. It is difficult to say if it is obtained here in Mayaguez at the same price, a lot of sugar which is bought for consumption or for exportation, as sometimes it is bought without knowing whether it will be shipped or consumed. Sometimes, after it is bought, the market increases, and it is shipped,
54 as by shipping it one has the advantage that the money is paid immediately, which materially affects the price paid for sugar; the fact that it is destined to exportation or for the island, that is a matter of will; he who can purchase must inform himself as the price he could pay. When sugar is bought here at the market, —for instance, for exportation and speculation with the same,— I think that if nothing is specified as to the time of payment, it is the custom that payment should be made after the delivery of the sugar.

That is *is* a custom controlling here also in San Juan and Ponce, and here in Mayaguez nothing else is stipulated. The custom is to make payment after delivery is made; it sometimes happens that part of the money is paid in advance, but it is said before making the business. If I make a transaction in that way, and nothing has been said as to the payment, I understand that I am not under any

obligation to pay before; and this is not that I understand it, but it is the custom.

Answering to questions of counsel for plaintiff, the witness says:—

There is always some influence on sugar sales for domestic consumption used by the sugar quotations in New York, although sometimes there are circumstances which influence otherwise.

It is not probable that if sugar is being quoted in New York at four fifty ($4.50), sugar for consumption may be sold at less price; the probability is that it is sold at a higher price than that which is controlling in New York. Generally, better prices are obtained for domestic consumption than for remittances of big quantities to New York. If the sugar is for domestic consumption and is sold to merchant at the Playa, it is sold in bigger lots, and if it is sold to merchants in the town, it is in lots of less importance. The quotations in New York always influence in that price for domestic consumption when it is the merchant who buys sugar from a manufacturer for reselling it for domestic consumption.

55 Statement Under Oath of Mateo Fajardo.

Witness MATEO FAJARDO appeared, and under oath, and in answer to questions put by counsel for plaintiff, stated:—

I am a co-owner and president of Central Eureka, in which business I have been engaged since 1907; before that time we manufactured moscabado sugar, and I have always intervened in sugar transactions here in Porto Rico since the year 1880.

By reason of such experience in that business, the factory under my charge sells sugar here during every year.

At this stage counsel for plaintiff made the following question to the witness:—

"Could Mr. Fajardo tell us, if he can, and by reason of his experience, which is the custom, with respect to sugar sellers in this market, in sale negotiations where nothing is stipulated as to the moment when payment should be made?"

Counsel for plaintiff filed his objection, in a general way, to such kind of testimony.

The judge said that it must be understood that the objection is renewed to all those questions, and the exception must be made to appear.

The witness continued, declaring:—

If nothing is said in a sugar transaction as to the moment when payment should be made, the custom at the market is to take its approximate value while it is being delivered. The custom is to collect while the sugar is being delivered, when nothing to the contrary has been agreed.

When no contract has been made in which no condition appears to the effect that the sugar should be paid before its delivery, the custom is that the purchaser is not under the obligation to pay for

the same until it is received; now the custom depends on the good credit and commercial relations.

We sell sugar here either for shipment or for consumption; we sell it when it is not the crop season in order to obtain means to cover our necessities, or when we are at the crop to sell our fruit. When the fruit is for shipment, then we are responsible of the Weight of the sugar and of the polarization of the sugar in the United
56 States, and generally they pay us at ninety-five per cent on the value of the sugar, reserving the five per cent to cover that liability until the final liquidation in the United States; that ninety-five per cent is paid according to the stipulation.

To questions of the honorable judge he answered:—

In the case of a sale where no time has been stipulated for making payment; where nothing has been said in the sale as to the time when payment should be made, and nothing has been done but selling the sugar, in that case it must be in small sums for consumption, as the sugar business is too big for the sale of fifty thousand bags; the custom is to pay for them upon delivery. You come down and sell a quantity of sugar and immediately get your money after delivery.

That is the ordinary and customary way save any agreement that may be made in each particular case; the custom is, that it be collected while it is delivered.

It is not the custom among sugar manufacturers, centrals and others, but it is necessary that in order to fix the rate of sale the New York market should be followed, which is the only market having our sugar which could not go to any other place, because it will not have the tariff protection.

The discount made on freight expenses, and so forth, is twenty-five cents, more or less, per hundred weight from land, twenty cents per hundred weight of sugar put on board at Mayaguez, and that depends precisely on the agreement, on the necessity of getting the money; if it has been paid in advance, that is a means for those who do not pay during the grinding season to increase their benefits, but twenty-five cents from land and twenty cents on board ship is the general rule. Therefore, the price is the one quoted in the New York market, less those twenty-five cents, now, for consumption. We sugar manufacturers try to divide among us the benefit of that, and we do not reduce the twenty-five cents, but we reduce less. Whenever I sell for consumption I always try not to reduce more than ten or fifteen cents from the New York market, in order to obtain some benefit, because in order to be able to
57 obtain sugar from outside they would have to incur the expenses, and in consumption we guarantee neither weight nor polarization; we sell by the gross weight; we sell the bag which we lose there; this means two cents further benefit obtained. If the price of sugar in the market of New York were four dollars, I would not sell at less than three eighty-five, because sending it to New York would result in three-eighty. I am well informed about sugar quotations during the grinding season; they are sent to me by the Royal Bank of Canada from here, Porto Rico, the Bank

giving them to all its clients, and we are guided by these quotations obtained from the Bank. When we make our liquidation of sugar cane, we do not wait for information from the Bank; we are guided by the Guánica Centrale, or by the averages of Willet & Grey, received by Fritze, Lundt & Co. This house, Willet & Grey, I understand, is an authority on sugar questions, as well as the Royal Bank, their business is given the information and the publication of a pamphlet, a daily bulletin; that house of Willet & Grey has a special organization devoted to sugar information, and we accept their quotations as exact.

Testimony Under Oath of Mr. Hiltz.

Questioned by counsel for plaintiff, he answered:

I represent the Royal Bank of Canada as acting manager of the Mayaguez office, and as such manager I am not always in possession of the information which the Bank gives to its clients about sugar quotations; but this year I possess such information, although last year, 1914, during the month of August, I hadn't such information.

[The witness is shown a certificate of quotations for the month of August of 1914, of the Royal Bank of Canada, signed by himself.]

This information which is shown to me was asked from me by Mr. Quinones, and I obtained it from our offices at New York or from our offices at San Juan, I am not sure as to this; I am not sure whether these quotations represent the official information of the Bank of Canada on these dates; they may be quotations given by the Sugar Sales Corporation. I suppose that this letter or cer-
58 tificate is an exact copy of the quotations received by the Bank, either from San Juan or from New York. I have no doubt that this certificate signed by me contains exactly such information. I do not know the signature of Willet & Grey, of the United States. It is the custom of the Bank of Canada to give this information to all its clients, sellers of sugar, when they apply for it. We have obtained this year this information from the Sugar Sales Corporation, and clients who are selling sugar have received it directly this year, but, in so far as the relations of the Bank with its clients is concerned, we are guided by these quotations.

Counsel for plaintiff offers this proof, properly identified by Mr. Hiltz.

Counsel for the defendant opposes for the same reasons given when the letter of November 19 was offered, although admitting the identity of the document presented.

The judge decides:

The court sustains the opposition, inasmuch as the manner in which this proof has been presented offers no guarantee at all.

Testimony Under Oath of Alfonso Valdés.

ALFONSO VALDÉS, under oath, and answering to questions from counsel for plaintiff, testifies:

In August, 1914, I was the president of Ana María Sugar Company, and on that date it had, in round numbers, about nineteen or twenty thousand sacks of sugar for sale.

The Ana María Sugar Company effected sales of sugar during the month of August, 1914, I think, at three thirty-five, if I remember well, and in the month of August or September we sold a big quantity at six fifty-two; this was the highest price we had for our sugar in the market of New York, and the rest of said sugar we kept in order to sell it a little later, and we sold it at three eighty-nine.

In regard to the quantity sold at six fifty-two, if I sold it in August, the sale took place during the latter half of August; I could find out exactly the date, because we keep a book of sugar sales,
59 which I have not at hand now. At that price I do not remember exactly the quantity sold, but I know we sold thousands of sacks. This price of six fifty-two we could have by giving orders to the Sugar Sales Corporation, our agents, to sell at their discretion when they should think that the market price was at its highest point; that is, to sell all the sacks except five thousand sacks; and the account rendered by that company showed the price of six dollars fifty-two cents.

I am taking part in sugar transactions since the grinding season of 1913-1914, and as president of the corporation I take a direct part in operations of sale of sugar, and am well informed as to market prices.

We obtained the information which regulates the price of sugar in Porto Rico, at the time to which I have referred, from Messrs. Willet & Grey and from Sugar Sales Corporation, which information had our absolute confidence. I base my sugar operations on such information, which I consider enough for the case, and we have always sold sugar in accordance with such quotations.

I have, although not here, the quotations for the month of August of last year; and I can get them.

On cross-examination by counsel for defendant, witness answered.

In August, 1914, I sold that sugar at six dollars and some cents, and I made other sales during the said month. I sold sugar to Grau at three thirty-five—I think, to him alone. If I remember well, we only sold to Grau and Sugar Sales Corporation.

Testimony Under Oath of Mr. Hiltz.

Questioned by counsel for plaintiff, he answered:

I have the quotations of sugar in the New York market during the month of August, 1914, the same having been asked by me of the Sugar Sales Corporation, and that is the original information

which I obtained from that corporation in order to have an idea as to the sugar market in New York.

Generally we do not send to the Bank's clients these quotations,—those which I obtain for my own information,—as I do not take any part in the furnishing of sugar quotations. The Sugar Sales Corporation, which is devoted to the sale of sugar in New York, as a part of its business issues these quotations, and this is the original letter received by me. They deserve my absolute confidence, and I believe them to be exact.

Counsel for plaintiff offers in evidence the quotations, and counsel for defendant opposes its admission, alleging it is an information not the result of the witness' direction and inspection, but an information which is furnished by another person, foreign to this affair, and who has not even personally directed the issuance of such information. It would be necessary to bring before the court all other proof about the subject which may have been obtained.

The court admits the evidence, and counsel for defendant excepts to the court's ruling.

The quotations, copied literally, are as follows:

The Sugar Sales Corporation, 35 Cedar Street, New York.

9 Sept., 1914.

Cable Address "Sugar," 9845.

Sept., 1914.

The Royal Bank of Canada, Mayaguez, P. R.

GENTLEMEN: Willet & Gray's official average price of sugar in New York for the month of August:

	Cuba.	Porto Rico duty paid.
Average price of 96°, centrifugal Sugars for the first half of August, 1914	3.781c.	4.807c.
Average price of 96°, centrifugal Sugars for second half of August, 1914	5.065c.	6.085c.
Average price of 96°, centrifugal Sugars for the entire month of August, 1914	4.459c.	5.477c.

Yours truly,

THE SUGAR SALES CORPORATION.
R. E. JONES, *Vice-President.*

Testimony Under Oath of Tomas Quinones.

To questions of counsel for defendant, witness answered:

As a merchant I have devoted myself since 1883, in Mayaguez, and in San Germán since 1880, to the purchase and sale in general of

merchandise, and here in Mayaguez, during the eleven or twelve years of my residence here, I have constantly taken part in the
61 purchase of sugar, coffee and other products, and with regard to sugar I have always made transactions during the grinding season, every year, and therefore I am well informed as to the custom and usages in this market *in this market* in regard to the purchase and sale of sugar.

Counsel for plaintiff makes the following question:

Please tell the court, if you know it, what is the usage and custom in this market as to the following: With the exception of cases of special agreement, what is the general custom as to the sale of sugar, on what terms and conditions is it sold?

Counsel for defendant states:

The witness testified yesterday on that subject. I desire to state my objection to the introduction of evidence as to the custom in this country; in the first place, because the existence of the contract between the parties has already been proved, if the evidence introduced by plaintiff proves anything, and they are bound to accept such proof and accept the valid existence of such contract, and, in the second place, because the law determines the manner in which payment should be made when the contract is silent in this regard.

Judge: The court admits it.

Counsel for defendant enters an exception.

The usage or custom in this market is the following: Generally, the seller of sugar comes and says: "I can sell you two hundred sacks of coffee or five hundred of sugar." "At what price?" At so much. "All right; all right." "When can it be delivered?" "Why, within eight or ten days, or, say, tomorrow or the day after tomorrow." Generally, one wants to know when delivery can be made. It is not the custom to make at that moment any agreement as to the time of payment. In La Playa there are constantly sales of thousands of sacks in which no conditions of payment are agreed beforehand, for the reason that it is a known fact that the person going there to sell goes also after his money.

[End of evidence for plaintiff.]

Counsel for defendant made an oral motion of nonsuit asking that the complaint in this case be dismissed, inasmuch as the evidence adduced by plaintiff did not prove the facts alleged in the complaint.

62 The court, after hearing the allegations of both parties overrules the motion of nonsuit, and counsel for defendant enters an exception.

Evidence of Defendant.

Testimony Under Oath of Mr. Hiltz.

Mr. H. HILTZ, appearing as a witness, in answer to questions from counsel for defendant, said:

I have been summoned to appear as manager, in Mayaguez, of the branch of the Royal Bank of Canada, with certain documents showing that a quantity of sugar had been deposited as security by the Ana María Sugar Company; I have that document at hand, which I will show you if necessary, and it is a document of sale of sugar and of the pledge thereof, bearing also some relation with certain receipts issued by the warehouse, but these receipts are not at hand at this moment. This instrument refers to sugar deposited in the warehouse of Ana María Sugar Company, and in that of Pagán, in La Playa, there is a note in the instrument showing that seven hundred and twenty sacks belong to the warehouse of Ana María Sugar Company and two hundred forty-eight sacks to the warehouse of Pagán, which is in the playa of Mayaguez. The instrument bears date of May 23, 1914. In regard to the sugar which is the object of this suit, I can say that this pledge comprised the said sugar.

Counsel for defendant offers the instrument of pledge in evidence, the same being marked "Defendant's Exhibit 1," and counsel for defendant, before entering his opposition to that instrument, cross-examined the witness, who answered as follows:

The note which appears written with indelible pencil was written by me on the date on which Mr. Valdés delivered the instrument to me; that is, May 23, 1914.

Counsel for plaintiff enters his opposition to the admission of such instrument for the following three reasons: The first is that the same does not show that Ana María Sugar Company had no other
63 sugar available on the date on which this sale was made to the Royal Bank of Canada; in the second place, that the instrument does not show that this contract was in force on the date of the sale of this quantity of sugar to Mr. Quinones,—that is to say, on August 4, 1914; and, in the third place, that this instrument is not pertinent proof against the allegations of the complaint, nor against the plaintiff, unless it be shown that this contract of pledge was notified to Mr. Quinones at the moment on which the contract for the sale of sugar was entered into, and that Mr. Quinones had on that date proper notice of this contract.

Counsel for defendant at this moment asks witness if on August 4, 1914, the loan which the pledge of sugar secures had been paid, or if the same was still in force; witness having answered that the loan was in force, the court admits the instrument offered in evidence and counsel for plaintiff enters his exception.

To the Royal Bank of Canada:

The undermentioned securities (and any renewals, extensions or substitutions therefor) are lodged with the Royal Bank of Canada as a general and continuing collateral security for the due payment of all advances made or to be made to us by the said Bank and of all our liabilities, present and future, to the said bank, interest at the rate of eight per cent per annum computed in the said Bank's usual manner, costs and expenses; and the said Bank is hereby authorized to realize all such securities as aforesaid in such manner as it may elect and without notice to or any further consent of the undersigned in the event of any default in the payment of the said advances, liabilities, interest, costs and expenses, the proceeds of bills or notes discounted for us to be considered as advances within the meaning of this instrument.

Al Royal Bank of Canada: Los..... que a continuación se expresan (como también todas las extensiones, prórrogas y substituciones de los mismos), quedan depositados en el Royal Bank of Canada, como garan[illegible] general y permanente del pago de todos los anticipos que nos ha hecho dicho Banco, o nos haga adelantar, y de todas nuestras obligaciones actuales o futuras; con el interés al tipo del..... por ciento anual, calculando de la manera que acostumbra el Banco, costas y gastos; y dicho Banco queda por la presente autorizado para vender todos los mencionados valores de la manera que juzgue conveniente y sin tener que dar
64 otro aviso o pedir más consentimiento de los firmantes en caso de alguna falta en el pago de los antedichos anticipos, obligaciones, intereses, costas y gastos, el producto de letras o pagares descontados para nosotros será desde luego considerado como anticipo o adelanto en el sentido de lo que aquí queda pactado.

Date fecha.	Particulars.	Amount cantidad.
Jan. 23/1914.	Bill of sale covering	
	968 Bags of Sugar of 250 lbs. ea.	5,800
	Warehouse Receipts covering	
	Above sugar.	
	Bags 720 Central Ana María	
	" 248 Bagaris warehouse	

ANA MARIA SUGAR CO.

A. VALDES, *Presidente.*

Dated at Mayaguez, P. R., this 23rd day of Jan. 1914.

Words underscored with a single line appear in longhand, in black ink, and words underscored with double lines appear written with blue pencil.

This sugar was pledged to the Bank by Ana María Sugar Company, as shown by document marked "Defendant's Exhibit 1"; Ana María Sugar Company could dispose of it after depositing the amount of the loan secured by such sugar.

In this way we have always dealt with Ana María Sugar Company, so that, in accordance with the contract, if they want to sell or dispose of a part of the sugar pledged, a deposit was made in the Bank covering the proportional part which was to be disposed of, and the Bank then issue the order for delivery.

I don't remember if, from the 1st to the 10th of August, 1914, the Bank made any loan of money to Ana María Sugar Company; I don't think that any loan was made to the said company.

In regard to this transaction, I had an interview with Mr. Quinones on the 6th of August, I think; on the afternoon of that
65 day Mr. Quinones came to my office inquiring why he had to deposit that money in the Royal Bank, saying that that was not in harmony with the custom among merchants, and so on; I then told him that I could do nothing, that I had orders from Mr. Valdés to the effect that if said money was not deposited at three o'clock of that day, I should not give an order for the delivery of such sugar. Then Mr. Quinones called Mr. Vals on the telephone, and I don't know the conversation between them, and after he finished talking to Mr. Vals on the 'phone he went away.

Questioned by counsel for plaintiff, he answered:

Mr. Valdés had also other sugar pledged to the Bank; the papers relative to that pledge are in my office, so that there are other instruments of pledge before that, which I have in my power and have not brought them with me. I know that the sugar which was sold to Mr. Quinones by Mr. Valdés is the sugar which is pledged by this instrument; during a conversation which I had with Mr. Valdés he told it to me, and that instrument shows that that was the only sugar pledged.

Counsel for plaintiff asks the court to eliminate the part of witness' direct testimony, which is merely hearsay evidence, and, besides, because his answers imply two things: hearsay evidence and a deduction on witness' part as to the sugar pledged.

The court states that it should have waited until the witness finished, as the other party has a right to question him.

Questioned by counsel for plaintiff, witness says:

Yes, the sugar sold Quinones was a part of this pledged sugar, because Mr. Valdés told it to me; I am not sure as to the date on which this transaction was entered into with Mr. Quinones. I knew of this transaction because Mr. Vals, the treasurer of the company, went to my office—I think on August 5, 1914—and told me that they had sold I don't remember what quantity of sugar to Mr. Quinones, and that Mr. Quinones had to deposit the price thereof in the Bank. This, Mr. Vals told me between eight and nine o'clock a. m. I don't know if he told the same thing to Mr. Quin-
66 ones on that date, before or afterwards. On the 6th, between 1:30 and 2:30 p. m., I called up Mr. Quinones on the 'phone,

and asked him if he was going to deposit in the Bank the money of Valdés' sugar. I simply desired to make him a favor by reminding him in case he had forgotten; that was the first notice I gave Mr. Quinones with regard to this matter, and that happened on August 6, 1914, at noon. Mr. Quinones came to my office on that afternoon, after I had advised him. It is true that when Mr. Quinones was in my office I spoke to him in regard to the deposit of the money, that I had instructions to that effect from Mr. Valdés. I don't remember whether, when Mr. Quinones finished talking over the 'phone with Mr. Vals, he invited me to speak to Mr. Vals on the 'phone; I cannot say that, as I am not sure; it may be he did invite me. I do not remember whether Mr. Quinones told me that Mr. Vals had informed him that the Central would not deliver the sugar because the Bank of Canada had prohibited him to do so, or had told him not to do so, but I would not be able to swear positively that Mr. Quinones did not tell me so. The only thing I remember which was told me by the employé of Ana María (I don't remember on what date he told me that the money should be deposited) was that if Mr. Quinones did not make the deposit in one of those days, at three o'clock, I should not accept the deposit; he did not make the deposit on that day, and I advised the Ana María to that effect; I had to advise the Ana María should Mr. Quinones fail to make the deposit.

I was advised by Mr. Valdés by telephone, from San Juan, that Mr. Quinones had to deposit that money.

When Mr. Quinones came to my office I told him that I had nothing to do with the matter, and that I would try to see Mr. Valdés; that he should try to settle the question between them. I have writen several letters to Mr. Quinones on this question. On the 8th of August I wrote the letter which has just been shown to me by Mr. Quinones, after a conversation had with him, two or three days later, which letter I wrote answering one of Mr. Quinones dated the 7th.

67 I also wrote him on the 10th confirming the telephonic communication, and on the 11th I wrote him the letter which is shown to me, and which I identify as authentic and signed by me.

It is true that before writing these letters to Mr. Quinones he requested me repeatedly to confirm, in writing, the telephonic conversation which I had with him in regard to the deposit of the money, which letters show my refusal to do so, and I refused to do so because it is not necessary to confirm by letter conversations had on the 'phone, as I had no interest whatever in the matter, as Mr. Quinones and the Ana María were my clients. I express in those letters the reason just stated that it is unnecessary to confirm in writing telephonic communications.

Counsel for defendant wants to know the object of these questions; counsel for plaintiff states that the object is to show that the witness is hostile to Mr. Quinones; the court overrules the objection, orders the interrogatory to proceed, and counsel for defendant takes exception.

I wrote that letter on September 10 to Mr. Quinones in spite of the

fact that I thought it was unnecessary to confirm, in writing, conversations had over the telephone, and in spite of the fact that I did not want to be mixed up in the matter, because Mr. Quinones had written a letter to the office at San Juan asking them to tell me to write that letter or give that information in writing. Then I asked Mr. Valdés if it was correct that I should give that information to Mr. Quinones, and Mr. Valdés answered in the affirmative. Mr. Quinones had to appeal to the office of the Bank at San Juan in order that I might give Mr. Quinones that information. I gave him such information because the Bank at San Juan left the matter to my discretion, and I used that discretion in favor of Mr. Quinones, as he seemed to — very desirous of obtaining such information, and I gave it to him.

Counsel for plaintiff introduces in evidence, without objection on the part of counsel for defendant, the three letters
68 referred to above, which are marked exhibits S, T and U, which, copied ad pedem litteræ, are as follows:

EXHIBIT S.

Mayaguez, P. R., August 8, 1914.

Mr. Tomás Quinones, Mayaguez, P. R.

DEAR SIRS: We have at hand your letter of the 7th instant. We regret not to be in a position to satisfy your wishes, expressed in your letter, for reasons already known to you and hereby confirmed: The sugar dealings between you and the Ana María Sugar Co., sale, terms of payment and delivery, were begun without any intervention on our part. Up to this date we have not taken any part in the matter, as we have no interest whatever in its termination, and for this reason you will understand our determination not to intervene in this matter. Any information or advice received from us was given with absolute good faith and without any prejudice to the Bank, and always inspired in our desire to act justly. In view of the difficulties which have arisen, and in order to protect the interests of the Bank, we feel compelled to refuse in the future any communication in regard to the matter.

Very truly yours,

(Signed) H. HILTZ, *Manager*.

EXHIBIT T.

Mayaguez, P. R., September 10, 1914.

Mr. Tomás Quinones, Mayaguez, P. R.

DEAR SIR: In accordance with the request contained in your letter of the 11th ultimo, we take pleasure in confirming our telephonic conversation had with you on the afternoon of August 5th ultimo, in which we advised you, having received from you, on their ac-

count presented on that day, the sum of $6079, six thousand seventy-nine dollars. Hoping that this will be satisfactory to you, we are,

Yours very truly,

H. HILTZ, *Manager.*

EXHIBIT U.

Mayaguez, P. R., August 11, 1914.

Mr. Tomás Quinones, Mayaguez, P. R.

DEAR SIR: We have taken note of the contents of your letter of this date. In justice to ourselves, we hereby adhere very strictly to what was stated in the last paragraph of our letter of the 8th instant.

Very truly yours,

(Signed) H. HILTZ, *Manager.*

69 Witness continues:

Referring again to the pledges of sugar, the depositor of this sugar was the Ana María Sugar Company; no other persons were the depositors of this sugar but the Ana María.

I have said that when Mr. Valdés paid anything on account of his debt we used to release a certain quantity of sugar; for example, if we had given him four dollars for each sack of sugar, when we paid those four dollars, a sack of sugar was delivered to him, plus the interest due upon the debt up to that moment; I am not sure if there is any clause in the contract of pledge in which that condition is stated; after examining such pledge, there is no clause in it giving that right to Mr. Valdés, nor does it say anything in regard to that transaction.

I have said that the Bank did not lend any money to the Ana María Sugar Company from the 1st to the 10th of August, and on that date Mr. Valdés had no sugar at his disposal, inasmuch as all of it was pledged to the Bank.

I am not prepared to state what is the exact number of sacks of sugar which were pledged in 1914 by the Ana María Sugar Company to the Bank, but I can say that there were thousands of sacks, and I don't think there were any sacks of sugar belonging to the Ana María Sugar Company which were not subjected to a pledge, although as to this I am not sure, nor can I swear to it; it is only a belief.

I have said that Mr. Quinones was a client of my Bank in the month of August, 1914.

I am a good friend of Mr. Valdés; I think Mr. Quinones is as good a friend of mine as Mr. Valdés.

Questioned by counsel for defendant, he answered:

The Royal Bank of Canada has been doing business with the Ana María Sugar Company ever since I — reside- in Mayaguez, from 1912 to 1913.

I regard to the sugar pledged to the Bank in 1914 by the Ana

María Sugar Company, I had an opportunity to inspect such sugar, when on two or three occasions I visited Central Ana María, as well as the sugar stored in Pagán's storehouse. The sugar seen by
70 me in the storehouse of the Ana María at that time was the quantity comprised in that pledge, and with regard to the sugar in Pagán's storehouse, there was some other sugar there, and it was impossible to count all the sacks there stored.

The reason why I answered to Mr. Quinones in the manner shown by the letters, plaintiff's exhibits S, T and U, was that Mr. Quinones, as well as the Ana María Sugar Company, being two clients of the Bank, and that matter referring to a difference arising between them, I deemed it advisable to let them settle the matter by themselves without mixing the Bank in the matter.

Testimony Under Oath of Alfonso Valdes.

Questioned by counsel for defendant, witness answered:

On August 4, 1914, I was the president of Ana María Sugar Company, and on that day I made a sugar operation with Mr. Tomás Quinones, in which I acted in the name of the Central Ana María. This operation or transaction entered into with Mr. Tomás Quinones on that date was as follows: On August 4 Mr. Tomás Quinones telephoned me—or I telephoned him, I am not sure—in regard to sugar operations, and I asked Don Tomás $3.25 per hundred weight of sugar. Don Tomás thought it was a very high price. We discussed the price and at last we agreed that the price per hundred weight of sugar would be $3.22½. That sugar was in the Ana María, and we had already loaded a wagon of the American Railroad with 160 sacks and the rest was deposited in the warehouse of the Ana María Sugar Company, and I told Mr. Quinones that as soon as I should receive the order from the Bank, from the Royal Bank of Canada, in regard to the delivery of the sugar, I would immediately send the wagon containing the 160 sacks, and I would start on the next week sending him the other sacks (those that were not on the wagons), in mule carts, in carts which we have at the Central, but that it was a necessary and indispensable requisite to deposit in the Royal Bank of Canada the sum, the amount,—that is, the amount of the bill,—the price of the sugar, to which Mr. Tomás Quinones agreed immediately. To Pelayo Vals, who is our treasurer, and who
71 was near the telephone, he told about the operation which he had effected between the Ana María Sugar Company and Don Tomás Quinones, telling him to write a letter at once confirming the operation. Mr. Vals wrote the letter and I signed it, and that same night I started for San Juan.

That is the letter which is marked "Plaintiff's Exhibit C," which is shown to me, which I signed, and I do not remember what became of it. I delivered it to Pelayo Vals, and it may be he ordered it copied or sent it by mail. After this I started for San Juan, on that same night, on the 4th, and on the 5th I was in San Juan, and on the morning of the 6th I called up the Royal Bank of Canada on

the 'phone,—I do not remember at what time in the morning,—and I asked them if Mr. Quinones had deposited the price of the sugar in the Bank. Mr. Hiltz informed me personally that he had not; then I told Mr. Hiltz that if Mr. Quinones did not deposit the amount of the sugar on that afternoon, before three o'clock, on which hour the transactions of the Bank are closed, that he should not accept the money on any other day; that he should not accept it on the 7th or 8th, because in that event I would cancel the sale of sugar; and I asked Mr. Hiltz if Mr. Quinones would not deposit the money on that same day, to call up Mr. Vals and tell it to him, because in this way Mr. Vals would write the letter of cancellation. Immediately I called up Mr. Vals from San Juan to the Ana María. As soon as I spoke with Mr. Hiltz I called up the Ana María, and told Mr. Vals that Don Tomás had not yet deposited the money in the Bank, that I had given such and such instructions to Mr. Hiltz, and that if Mr. Hiltz should telephone him or should tell him that Mr. Quinones had not deposited the price of the sugar on that day, he should write a letter to Mr. Quinones cancelling the operation, and that was all.

I started from San Juan on my return to the Central on the 7th—I think in the morning; I came on the train, and on arriving I was told that Mr. Vals had written the letter of cancellation to Mr. Quinones. This is the letter marked "Exhibit J," dated August 6th, whose identity I have accepted.

As to the letter addressed by Mr. Quinones on the 7th, I knew about it on my return from San Juan; the same was therefore already written when I returned.

72 On the 8th I wrote Don Tomás, or I received a letter from Don Tomás dated the 7th. I wrote him a letter on the 8th, in which I told him that the text of his letter had surprised me, inasmuch as he knew very well that I had told him over the telephone that it was necessary to deposit the money in the Royal Bank of Canada; in the first place, because the sugar was pledged, and, in the second place, because it was an offer made by me. On the 9th nothing happened, I believe, and on the morning of the 10th the Royal Bank of Canada called me up and informed me that Mr. Quinones or his representative was in the bank, with a check for the amount of the bill for the sugar. I told the bank that they should not accept that money; that they should not give the order to Mr. Quinones for the delivery of the sugar, because the operation had been cancelled. Immediately I wrote a letter to the Royal Bank confirming what I had told them on the telephone. It is my custom to confirm by letter what I say over the telephone.

On no occasion from the 4th of August, 1914, up to the 15th of the same month, and up to the present time, has Mr. Tomás Quinones, or any other person representing him, come to see me personally, or the treasurer of the Ana María Sugar Company, in order to offer the amount of the sugar bill; nor have they come to see Mr. Vals, I believe, nor has any amount been received on account of such sugar.

In my conversation over the telephone, of August 4, 1914, I informed Mr. Quinones in regard to the price, manner of delivery and

terms of payment, informing him that he should deposit the money in the bank before I could deliver the sugar.

From the time I had such telephonic conversation with Mr. Quinones to the date on which I ordered dictated the letter which was sent to Mr. Quinones, one minute, or less than one minute, elapsed; I did this as soon as I hung the receiver. Mr. Vals was at his desk and immediately he wrote that letter, and when I told him to write the letter I gave him a brief idea of the operation; he was there and had heard the conversation, and gave him a brief idea of the transaction.

73 I did not speak with Mr. Quinones after the 4th of August, 1914. In the telephonic conversation of the 4th I told Mr. Quinones that the sugar was pledged and that it was necessary to deposit the money in the Bank before issuing the order.

The letter marked "Exhibit G" was received by me in the Central. I read it and I took note of its contents, and I could notice, after the receipt of such letter, which we allege contains libelous charge, that there were certain rumors. It was said that Valdés had sold some sugar to Don Tomás Quinones, and afterwards did not comply with what he had promised. Certain rumors originated in persons who told it to me as a joke. I heard it said here and there, and several times I heard such thing said by friends; they said it to me as a joke; and I resented their telling such thing to me, even as a joke. That was not only in Mayaguez, in San Juan they also spoke to me about that matter. Two commercial houses, one of them was the house of Ochoa, where they asked me what had happened, they wanted to know the details. I don't remember, but I could notice that there was a desire to know whether the contract had been broken by us or not, but I never indulged in conversation upon this matter.

The business of the Ana María Sugar Company is the manufacture and sale of sugar; the Central has sugar-cane all her own, and, besides, buys cane from tenants (colonos); my estimate is that we have from eight hundred to nine hundred thousand dollars invested in such business. In regard to the manufacture of sugar, we have molasses for sale; transactions are entered into up to date in Porto Rico and in the United States.

The office of the Central Ana María is in the ward of Sabanetas, at eight or nine kilometers from Mayaguez. The correspondence written during the day by the Central is delivered during the night to the traveling man, who comes to Mayaguez every morning to make purchases and bring the mail; that same traveling boy takes letters which are written on the day before; it is his custom to go once in the day—in the morning.

On cross-examination by counsel for plaintiff, witness answered:

74 In the first letter confirming the sugar contract between the Ana María Sugar Company and Mr. Tomás Quinones no date is fixed for Mr. Quinones to deposit the money in the Royal Bank of Canada. It was on the 6th of August, 1914, that I requested that Mr. Quinones deposit the money; it was not on the 5th of August, 1914. Neither in the letter nor in the contract was the 6th of

August of 1914 fixed as the date on which deposit should be made in the Bank, and I don't remember having told Don Tomás that he should have deposited the money on that date. I did not tell Mr. Quinones during the telephonic conversation, neither in my letter confirming such conversation, the date on which he should deposit the money; but it is not that I fixed the 6th, the fact is that I had waited three days for Don Tomás to deposit the money, and I consider it natural that an offer like that should not be open indefinitely.

I believe that I spoke with Don Tomás on the 4th of August, 1914, over the telephone, in the afternoon, about four o'clock; I am not sure; I cannot say whether it was immediately after lunch time or the end of the day; but I ordered the Bank not to admit the money, over the telephone, on the morning of the 6th, telling them that they could receive Mr. Quinones' money at any time before three o'clock of that day.

I spoke with Mr. Quinones over the telephone on the 4th. He had still before him the day of the 4th remaining in which to deposit the money. I understand that the Bank closes at three o'clock. I do not remember whether I spoke to Mr. Quinones on the 4th, at four o'clock in the afternoon, and I say that Mr. Quinones could deposit on the 4th, although I do not know whether I spoke to him before or after three o'clock, for if it had been before three o'clock he could have made the deposit, and if it had not been before three Mr. Quinones could have gone to see Mr. Hiltz about the matter and given him the check, to be delivered in the morning, because the Bank remains open—what is closed—is the deposit account, but the offices of the Bank remain open. The office of the cashier of the Bank is closed, so that a check presented after three o'clock in the afternoon would not have been received, I believe, by the
75 cashier, but it is possible that the manager would have accepted it, although the contract was to deposit with the Bank and not with the manager, so that he had to deposit in the cashier's office, and not in the person of the manager. I have not said that it was agreed that the 6th of August, 1914, at three o'clock P. M., was the date fixed in the contract for the deposit of the money by Mr. Tomás Quinones; I have not agreed with Mr. Quinones that the 6th was to be the day on which the deposit should be made. I understand that if something is offered to me for sale—for instance, that desk, and they tell me it is worth three dollars, that offer is not open indefinitely; if I do not answer today, I think that if tomorrow you [sic] deliver to me the three dollars, I can tell you: Now, it is worth three dollars and a half; moreover, I waited two days; supposing that it had been before three o'clock P. M., I waited three days, and I telephoned the Bank on the morning of the 6th, nothing has been agreed upon, and I think that when no day is fixed one should not wait indefinitely.

I had the 160 sacks which I offered over the telephone, on the 4th, ready to deliver to Mr. Quinones in Central Santa María, on one wagon of the American Railroad Company, which was already loaded, because the storehouse is small and cannot hold all the sugar, and the sugar was put on the wagon so as to keep it there, in which place it was since May 15,—two months and a half, more or less. It is

true that, in accordance with the contract of pledge with the Royal Bank, I was obliged to keep such sugar deposited in the Central or here in Mayaguez. The wagon could go into the storehouse; the storehouse had a cement floor and a wooden platform had been constructed. When sugar is placed on the cement it gets wet, and we have constructed a wooden platform on the floor; but in the place where the railroad track passes there is no wood; therefore the wooden part of the storehouse was full of sugar, because we did not want to keep the sacks on the ground, because the track is constructed upon the ground; we used a wagon, and the track goes into the warehouse itself and the wagon is kept in the warehouse. Such warehouse can hold 740 sacks, less 160.

76 The number of sacks sold to Mr. Quiñones was 748. In the warehouse there were 720 sacks as I have seen in the place, and the remaining 28 sacks were to be taken from Mayaguez, where there was a large amount of sugar deposited in the warehouse of Successors of Bianchi, in charge of Mr. Fagán, and in another warehouse. It is true that one of those warehouses is situated in front of the house of Mr. Quiñones and the other in a contiguous street.

I sold Mr. Tomás Quiñones 748 sacks, and Don Tomás wrote 740 in the letter. I intended to fill this order of sugar from the other Central. When I spoke with Don Tomás over the telephone I thought that I had 740 or 48 sacks, more or less, and I agreed to the sale of that quantity, and afterwards I discovered that I only had 720. I had to deliver such sugar as specified in the letter, a part of it in the wagon already loaded and the rest in carts during the following week.

That manner of delivery was agreed upon in order to save railroad freight. I have carts and mules, and if I send the sugar little by little every day, each day I could send a good number of sacks in carts, and, as the carts are my own, I could save the railroad freight. It would be difficult to say how many sacks I would be able to send daily, but I could send many of them, because I have enough own. If I desired, I could send probably the 700 sacks in only one day, but I would not have sent them in one day, because it would involve too much work. The stipulation that the sugar be delivered in portions was due to my convenience, as I did not want to overwork my cattle; that was a stipulation proposed by me. It was not Mr. Quiñones who proposed the stipulation as to partial delivery; it is natural that it should not be Mr. Quiñones. I do not want to tell you yes or no, but I was the one benefited with this stipulation, as I did not have to overtax my cattle, and Mr. Quiñones, too, could benefit himself by that, in the sense that if I should transport for Don Tomás 700 sacks in a day, he would have to use the services of many workmen in the Playa, and five laborers working during one day would mean so much more per sack. I do not think it is more costly to put many workmen to do the work than to put a small number, but if one workman is hired for half a day, surely

77 he would have to pay more to him than if employed for a whole day, or if employed for five days. The fact that I would benefit myself was not mentioned on entering upon the con-

tract. I cannot tell you—I don't remember—who proposed the stipulation that delivery be made partially.

The telephonic conversation took place on the 4th, at noon; I don't remember the hour. I am not sure whether I called up Mr. Quiñones or Mr. Quiñones called me up. The question as to whom initiated the operation of the sale of the sugar would depend on whether Mr. Quiñones called me up or vice versa. As I remember, once I took to Mr. Quiñones, and to the other merchants in the Playa, some samples of sugar, and Don Tomás did not want it; on the 3rd he telephoned me to the electrical plant and I quoted him $3.20, and he said that there was no use bothering about that; and on the following day, August 4, 1914, I don't remember whether it was Mr. Quiñones who called me up or vice versa; I don't know who initiated the conversation; the things that took place at that moment can be ascertained in the telephone station. I remember all the conversation. I was the one who said that the price should be paid before delivery; I can remember that; and I expressed to him that the sugar was pledged, and therefore it was necessary for Mr. Quiñones to deposit the money in the Bank in order to be able to obtain the order of delivery from the Bank, and Mr. Quiñones answered that it was all right, although I don't remember his exact words, I only remember their meaning. Quiñones did not protest nor ask until what day would he be allowed to deposit the money, nor did it occur to me that the money should be deposited on the following day, nor on the afternoon of the 5th, nor on the afternoon of the 6th, nor did I tell him that if he did not deposit I would consider the contract rescinded; therefore all that remained pending. I did not receive on the 5th any letter from Mr. Quiñones confirming the operation, and, in fact, I could not have received it.

The first time I saw the letter of the 4th, marked "Plaintiff's Exhibit B," was on the 7th or 8th. I returned from San Juan on the 7th, and I remember having seen it on the 7th or the 8th. I read it; I took note of its contents; I did not answer it. That is
78 the letter in which Mr. Quiñones confirms the sale on his part, which letter I did not answer, because I was not in the Ana María, and, although I saw it on the 7th, I also saw others which Don Tomás had written me on the 7th or 8th, when I returned from San Juan; I read this letter: "After my letter of yesterday, which I now confirm, had been mailed, I have been favored by yours," etc. That is the second letter from Don Tomás, the one which I saw, together with the other of the 7th. The one dated August 5, 1914, I did not answer, because Mr. Vals had answered it before my arrival, and I did not answer the letter of the 4th when I saw it on the 7th, because, as Don Tomás had already written that letter in which he told me that he did not agree upon the terms of my letter, in which I confirmed the operation, and as the Central Ana María had already answered that letter to Mr. Quiñones, for that reason I did not answer.

I have been a merchant for three years; I answer the letters which I receive, and that letter of the 5th I did not answer, because, on reaching Mayagüez, when I saw Mr. Quiñones' letter of the 4th, in

which he confirmed the operation, which letter crossed with mine, I put it aside until the 7th, and I did not answer it, because I was not in the Central when it was received. Mr. Vals read it—I don't know whether he read it, but I suppose he read it—and as I was not there I suppose he did not answer it; and on my return I read it, but did not answer it, because another letter had already been written in answer to his letter of the 5th.

On no occasion from the 4th on did I inform in any way to Mr. Quiñones that he had to deposit that money from the 5th to the 6th, and that if he did not deposit on the afternoon of the 6th, the operation would be cancelled. As to that I informed him later in another letter. I cancelled the operation of the 6th. I did not, in any way, inform Mr. Quiñones that if he did not deposit on the 6th, and at such hour, the operation would be cancelled. We did not set a day for the deposit, and I did not think that it was necessary to make it on a definite day, but I did think it necessary to inform the Bank of Canada from San Juan that if on that day, at three o'clock
79 in the afternoon, he should not make the deposit, the money should not be accepted later, and I thought it necessary to tell it to the Bank, and not to the interested parties, because when I make an offer of sale, when I enter into an operation for the sale of sugar, it is natural that it should be accepted at once, and not wait three days for acceptance, and for that reason I did not notify Mr. Quiñones, but the Bank, because two days and a half had already passed, and I thought that sufficient time had been given to Mr. Quiñones.

I was a friend of Mr. Quiñones up to that moment; we had entered into sugar operations, and I have personal knowledge that Mr. Quiñones has entered into important operations with my father, Mr. Valdés; that Mr. Valdés has had dealings with Mr. Quiñones, Mr. Quiñones being a creditor for important amounts owed to him by the Ana María. I had knowledge that Mr. Quiñones was a solvent merchant of the community, and I know it now. There was nothing up to the trouble or difference whatever; nevertheless, I did not tell Mr. Quiñones: "If you do not make the deposit this afternoon, I will consider the operation as cancelled." On the 6th I telephoned the Bank, because I thought that sufficient time had passed; I wanted to close the operation. I gave sufficient time to Mr. Quiñones, inasmuch as I telephoned the Bank in the morning, and the Bank telephoned Mr. Quiñones and told it to him. I knew that during that period sugar was increasing in price day by day; I knew that the quotation of the 5th was higher than that of the 4th; I knew in San Juan that on the 6th sugar quotations in San Juan were higher than those of the 5th. I visited the Bank of Canada on the 6th and I obtained knowledge as to the sugar quotations of the 6th. I discovered that the market prices were increasing on that date. I knew that it was expected that prices would be much higher; so that, when I telephoned the Bank of Canada on the morning of the 6th, telling them that if Mr. Quiñones did not make the deposit on that afternoon they should not accept the deposit. I already was informed that the sugar market was going up in an almost violent manner. The fluctuations were not enormous that day, but great

prices were expected; I was informed as to that by the cablegrams.
I did not speak with anybody in San Juan about that. I
80 knew by the cablegrams that sugar was going up and that
good prices were expected, but on the 6th it had already gone
up and better prices were expected; it was natural that sugar should
increase in price.

I telephoned the Bank not to accept the deposit of Mr. Quinones on the 6th. I am sure this happened on the 6th, and not on the 5th; so that if Mr. Hiltz had testified that it was on the 5th, Mr. Hiltz would be mistaken.

The mail sent from Aguaco arrives in the morning; at the same time the traveling man arrives, between seven and nine in the morning, at which time he delivers it in the post office for distribution by the letter carrier. I don't know at what time the letter carrier distributes those letters. I have never received letters from my central. I receive them all in Mayaguez; the traveling man brings them. He goes to the post office, he has a key to the box. The letters written by the Central are brought by the traveling man and mailed in the post office, but I don't know at what time the letter carrier distributes them.

I already stated that as soon as I read the letter from Mr. Quinones—which I considered libelous—I at once began to hear rumors when I went to Mayaguez. When I went to San Juan, when I had occasion to see my friends, with my comrades, they told me: "What has happened between you and Don Tomás that you did not deliver the sugar?" They knew about the transaction, but not from me, as I had not spoken about it to anyone. Those persons which spoke to me did not say anything about the letter; they spoke to me, but did not say anything about the letter. What they said was that I had failed to live up to my agreement in a sugar transaction on account of the increase in price. They referred to the sugar operation with Don Tomás, but nobody has spoken to me about that letter in particular. Nobody has told me seriously that he does not want to deal with me, because I do not live up to my promises. This was told me as a joke, but I resented it; although it was a joke, I felt somewhat ashamed, because I could guess its meaning. I always tried to explain, more or less, how the thing had happened, but they
generally answered: "Yes, but remember that the sugar was
81 increasing," and this and that. It was not Don Tomás who
said it, but friends. But one friend of mine told me: "Why, Don Tomás says that you have failed to comply with your agreement because sugar is increasing in price." I don't remember who said that to me. Ochoa, of San Juan, spoke to me about the same thing; he asked me what had happened. He told me the same thing that my friends here have told me, but none of them spoke to me about the letter.

My Central could draw for eight hundred or nine hundred thousand dollars, and, in my opinion, has suffered losses on account of that letter; its reputation has suffered. There has been and there is a certain intrigue.

The banks with which we do business have not withdrawn their

credit from us. The colonos have not notified us that they will not have their cane ground in the Central, but they have demanded security, which they did not do before. They demand that my signature be authenticated by a notary public on entering upon the contracts for the grinding of cane. It is a custom to enter into the contracts for the grinding of cane before a notary public, but I used to make some verbal agreements, and others, with only my signature and that of another person, and now some of those who did not ask me any signature, and who signed a contract or a letter, have demanded now that the contract be made before a notary public, and I have resented that deeply.

That is the only difficulty which I have encountered in Mayaguez, Porto Rico, in any kind of business.

I have not shown that letter to anybody. Mr. Vals saw it after I had opened and read it, as Mr. Vals is the chief clerk and reads almost all the correspondence, but it was I who read the letter and I have not shown it to anybody, and I maintain that it is due to this letter that the colonos are now demanding such signatures.

I testified yesterday that in 1914 I had, from the grinding season of that year, thousands of sacks of sugar, and I have sold them all. The last sale made by me was in December, 1914; on that day I had some sugar remaining from the grinding season of 1914, and
82 I mixed it with the sugar for this year.

I paid the Bank of Canada the amount of the loan secured by the 1914 pledge, paying the balance with the sale of the fifteen thousand sacks, more or less, effected by me in the month of September; so that in the month of September, 1914, I owed nothing to the Bank of Canada as a result of the 1914 grinding season, as I settled my account with said Bank.

The instrument of pledge which was presented yesterday to this court, and which is a document referring to the grinding season of 1914, is in the hands of the Bank now, uncancelled, because the Bank keeps all those documents and never delivers them to me. Those documents are not cancelled when I pay them; the Bank always keeps them. I haven't any document, either of that sugar or of any other, as, in fact, I have never requested them. The Bank gives me the promissory note when I pay one document of pledge, which is given as security for the promissory note signed by me. In this particular case they gave me five thousand eight hundred dollars, and I signed a promissory note on account. I paid that amount, and they gave me the promissory note, properly cancelled.

That is a document of sale of sugar in which I state that I have sold to the Bank a quantity of sugar, as per contract; that when that amount is returned, then I dispose freely of the sugar and the sale becomes ineffective. I have confidence in the Banks, and it has never occurred to me to request those papers from them. The only thing which they give me is the promissory note, cancelled, and it does not appear that any note has been put on the document of pledge, and it has never been the custom to put it; so that this document of pledge was, and is at the present time, in the hands of the Bank.

Questioned by counsel for defendant, he answered:

When I set out for San Juan on the night of the 4th of August, 1914, among other orders given to Mr. Vals (I always instruct him as to what must be done during my absence), I told him that the sale to Mr. Quinones would be in force up to the 6th; that is,
83 that on the 6th Mr. Quinones was bound to make the deposit in the Bank so that delivery of the sugar could be effected.

The reason for my trip to San Juan on that occasion, on a Tuesday, was the spending of a few days with my family. I started on the 4th and returned on the 7th. I remained there three days. It is my custom to go to San Juan to see my family once every two weeks during the grinding season, and once a week when not in the grinding season.

When I spoke over the telephone with Mr. Quinones, on the 4th of August, 1914, and gave instructions to Mr. Vals to the effect that he should write the letter written on that day, I could not state the price at which sugar would be sold in the Mayaguez or the New York market on subsequent days; this would be absolutely impossible. Neither I nor anybody else could say the price of sugar on the following day, but two or three hours later; the more so on that occasion when the market was fluctuating so much—was nervous on account of the European war, which had broke out but a short time ago, and it was impossible to predict whether sugar would increase or decrease in price. The information which I had on that day—the 4th—as to the increase in price, I had also before going to San Juan. When I ordered the letter written to Mr. Quinones, confirming the contract, I already had information to the effect that there was a prospective increase in price.

I have already stated that it is impossible—there is no basis on which to state at what price sugar will be on the following day; not even an expert could predict that.

So far as the 6th of August, 1914, is concerned, the information as to the price of sugar during those days I accept as good because the cablegrams came from a trustworthy source. I could not say that on that date sugar would be at such and such a price, because it is absolutely impossible to say at what price sugar will sell on the following day; right now I have more than twenty thousand sacks of sugar, and I am speculating—playing with them.

On the 4th of August, 1914, during those days, the increase had already begun. I think the European war broke out on
84 the 1st of August, and immediately the increase was noticeable, and I think that it was from the very first day of August that sugar began to increase on account of the war.

The reason I had for cancelling the sugar operation entered into over the telephone between the Ana María and Mr. Quinones, as I said yesterday, is the following: If Mr. Dominguez offers me a desk for sale, it is natural that the offer should be accepted on the same day. The offer made by me to Mr. Quinones, as I said yesterday, was to deliver the sugar in the manner agreed upon, at three twenty-two and a half the hundred weight, Mr. Quinones to deposit the money in the Royal Bank, and I was under the impression that Mr.

Quinones was to make payment at the earliest possible date; but, however, waited two or three days for Mr. Quinones to make the deposit, and those days having passed, such time being amply sufficient, I cancelled the operation. Moreover, Mr. Quinones and I were in the following contingency: For instance, if sugar went down in price at that moment, Don Tomás might seize the opportunity, and say: I don't care for the sugar; if sugar went up, Mr. Quinones, if the offer was still open, might say: Here is the money; let me have the sugar.

Mr. Quinones waited until the 10th of August, on which date sugar was at a higher price,—that is, at six fifty-two,—to make the deposit, and I did not deem it natural to leave the matter open.

Since the death of my father, which occurred on October, 1913, I am the manager of the Ana María Sugar Company; and from that time I have been residing in Mayaguez, and am engaged in business here. Being connected with almost all the commercial houses of Mayaguez which are engaged in the sugar business.

As to any special custom in the Mayaguez market as to the date of payment of sugar pledged without fixing the date of payment, I must say that I have made sales of this kind, and it has always been the custom to deposit the money in the Bank before delivery of the sugar, at the latest, on the day after the sale. And I could say the names of persons to whom I have sold sugar in this manner on more than one occasion. I cannot say that this is the
85 custom everywhere, but that is my experience. In cases of pledged sugar, the money has always been deposited in the Bank before delivery of the sugar, and the money has been deposited in the Bank immediately, on the same day or the following day. This has been my custom and of the persons with whom I have dealt, because if sugar is pledged you cannot deliver it before the Bank has received the money; and all the sugar belonging to that Central for the season of 1913-14 was pledged.

Counsel for plaintiff requests that the answer given by witness in regard to the pledge of the sugar be eliminated from the record, because it is a known fact that if there is a pledge it should be shown in writing.

The court allows the witness to go on, and counsel for plaintiff takes exception.

Questioned by counsel for defendant, witness proceeds:

I stated that if from the 4th of August, 1914, to the 6th of August, 1914, at three o'clock, Mr. Quinones had deposited the price of the sugar in the Royal Bank of Canada, I immediately, on receiving the order of delivery from the Bank, would have delivered the sugar to him, and the Bank would have given the order immediately as it had instructions from me to the effect that if Mr. Quinones deposited the money on the 6th, before three o'clock, they should at once send me the order for the delivery of the sugar, as has been agreed with Mr. Quinones. On that date, on the 4th of August, up to the end of the month, sugar was quoted here in the market.

At this moment counsel for defendant offers the testimony of witness Primitivo Grau, a partner of M. Grau & Son, a house established in the city of Mayaguez, merchants engaged in the purchase and sale of merchandise in general, and, among other things, to the purchase and sale of sugar, stating that this witness would testify that on or about the 6th of August, 1914, he bought from the Ana María Sugar Company a quantity of sugar, and it was stipulated in the contract that the price of such sugar was to be deposited in the Royal Bank of Canada; the sale having been made at the price of $3.35. Counsel for defendant said that he admitted
86 that if the witness were present he would make such statements, but he opposes to this because it is not a part of the res gestæ, and because it is an isolated case and not pertinent to the issue.

The court sustains the opposition, and counsel for defendant takes exception.

Testimony Under Oath of Mateo Fajardo.

Before this witness began to testify, plaintiff admitted that the increase in the price of sugar from the 1st of August, 1914, was due to the European war.

Questioned by counsel for defendant, witness says:

I understand the reason for the increase in the price of sugar from the 1st of August, 1914, was the European war.

Unless the contrary is agreed, the payment of the price of sugar is generally made while the sugar is being delivered, and I don't know what the custom is when the sugar is pledged.

I know the Ana María Sugar Company and its present president, Alfonso Valdés, since he is in charge of the said Central, and I knew him before, during the life of his father.

Testimony Under Oath of Pelayo Vals.

Witness PELAYO VALS, under oath, and questioned by counsel for defendant, states:

I am the treasurer of the Ana María Sugar Company since the grinding season of 1913-14.

I have knowledge of the transaction between the Ana María Sugar Company and Don Tomás Quinones, to which this matter refers. On the 4th of August, 1914, and while I was in the office of the Ana María Sugar Company, as customary, in Mayaguez, in the country, I heard Mr. Valdés talking over the 'phone about a sugar transaction, about price. And as it is my custom to get well posted as to what may be decided in sugar operations, in order to instruct the employés, I could notice that Mr. Valdés was talking about price of sugar, although I did not know to whom he was speaking,
87 and I came to the conclusion that he was entering into an operation for a quantity of sacks of sugar at three twenty-two and a half. I afterwards saw him speaking about the delivery of the

sugar, and later I heard him say that he should deposit the price of the sugar in the Royal Bank of Canada. When he finished talking on the 'phone, Mr. Valdés ordered me to confirm such operation with Mr. Tomás Quinones and be prepared to fill it. It was then that I wrote the letter marked "Plaintiff's Exhibit C," signed by Mr. Valdés. On that same day Mr. Valdés set out for San Juan, in the evening; and before leaving he repeated the orders in regard to the sugar operation, telling me to be on the lookout for the deposit of the money, so that I might then proceed to filling the order. On the morning of the 5th, on my way from Mayaguez to the Central I went to the office of the Royal Bank of Canada and notified Mr. Hiltz the operation entered into by Mr. Valdés and Mr. Quinones, and that Mr. Quinones had to deposit the price of such sale, and that he should advise me thereof, in order that I might proceed to the delivery of the sugar. Mr. Hiltz informed me on the 6th, after the Bank's transactions of the day had been closed, that Mr. Quinones had not made the deposit of the money, and I, then, following instructions from Mr. Valdés, wrote the letter marked "Defendant's Exhibit F," cancelling the sugar operation.

From the time elapsed from the 4th of August, 1914, and the moment on the 6th on which I wrote the letter cancelling the contract, neither Don Tomás nor any other person representing him offered to the Central the price of the sugar.

On the 6th Mr. Valdés gave me instructions from San Juan, reminding me that if Mr. Quinones did not deposit the money on that day, I should cancel the operation.

On the 4th I was at a distance of three or four yards from the place where Mr. Valdés was speaking with Mr. Quinones by telephone, and it was possible for me to hear well the conversation, in which Mr. Valdés was saying that he should deposit the money, and that was confirmed in the letter of the 4th, which was addressed by the Ana María Sugar Company to Mr. Quinones.

88 The sugar which the Ana María Sugar had on the 4th of August, 1914, was all pledged to the Royal Bank, there wasn't any sugar left.

On cross-examination by counsel for defendant, witness answered:

I did not know, nor did I know at that time, with whom was Mr. Valdés talking over the 'phone on the 4th of August, 1914. I knew it because Mr. Valdés told me; and it may be that Mr. Valdés was speaking with some other person than Mr. Quinones.

The confirmation made in the letter of the 4th to Mr. Quinones was due to the fact that Mr. Valdés told me what I should state in such letter. I only reproduced instructions received from Mr. Valdés, as I did not take any personal part, or knew about the terms upon which the operation was agreed upon.

On the morning of the 5th I went to the Bank to notify Mr. Hiltz about the operation entered into with Mr. Quinones, and I told him that, insofar as the sale of the seven hundred and forty odd sacks is concerned, Mr. Quinones should deposit the money in the Bank

before we could deliver the sugar, and in this I was following instructions from Mr. Valdés.

The date indicated by me, up to which Mr. Quinones could deposit the money, was the 6th; I cannot recollect having told Mr. Hiltz that the deposit should be made on the very 5th.

Counsel for defendant reads to the witness the letter marked "Defendant's Exhibit T," and witness, after hearing the letter, states:

As so long time has elapsed since that, I was and am under the impression that it was on the 6th that the money should be deposited, but I could not assure positively whether it was the 5th or the 6th. I cannot say whether it is I or Mr. Hiltz who is mistaken.

I remember that Mr. Quinones called me up from the Royal Bank of Canada on the 5th of August, 1914.

89 If I am not mistaken, it seems to me that Mr. Quinones called me up on the 'phone—I think from the office of the Royal Bank of Canada—and expressed himself, as you have just said, in the following way: "Say, Mr. Vals, what do you mean by this; I have received a letter from you in which you now say that I have to first deposit the price of this sugar in the Bank of Canada, otherwise it will not be delivered to me * * *." To which remarks you say that I answered, more or less: "Don Tomás, I really know nothing about this; I wrote that letter under instructions from Mr. Valdés, and if I don't deliver the sugar it is due to instructions received to that effect from the Bank of Canada." I am in doubt as to whether Mr. Quinones called me up on the 'phone from his house or from the office of the Royal Bank of Canada, but it seems to me that it was from the office. I remember something of what you say; I don't remember whether that was said on the call to which you refer; I don't know if it was from the Royal Bank of Canada or from the house of Mr. Quinones.

In regard to those two communications: In regard to the first one, after which you state that Mr. Quinones called me up from the Royal Bank of Canada, for a second time, and that he expressed himself in this or similar words: "Vals, please repeat to me now the words which you said a few minutes ago about the sale of sugar, because I could not catch your meaning," and that I then said, more or less, the same said by you in regard to the first communication, to which Mr. Quinones then answered: "Why, I am in the office of the Bank, and the manager, who is seated near me, will speak to you and tell you that no order has been given not to deliver the sugar; that that is false," and that then the manager of the Bank went to the telephone and spoke to me in English. I don't remember anything about the two communications; I only remember one; the one from the Royal Bank of Canada; I could not deny that there were two communications on that day, but I am not sure; I remember that Mr. Quinones called me up on the 'phone, and I am in doubt as to whether it was from his house or from the Bank, and he asked me the reason

90 why he was requested to first deposit the money, and I answered to Mr. Quinones that I knew nothing about that; that those were instructions received from Mr. Valdés, and without that

requisite I would not be able to delivery the sugar unless the Bank should issue an order of delivery; that was what I communicated to Mr. Quinones; I don't remember having said to Mr. Quinones that I would not deliver the sugar because the Bank had ordered me not to deliver it; I don't know whether that is true or not, I don't think so, that I told that to Mr. Quinones on that occasion, as I confined myself to telling him that I would not deliver the sugar; I am not sure that I said that; I think I did not.

On that same day, the 5th, Mr. Hiltz asked me over the telephone what I decided as to Mr. Quinones, and I told Mr. Hiltz what I told him on that same morning, that I could do nothing if the money was not deposited. I don't remember whether in that communication I told him that the Bank had not given such orders; that the Bank had orders not to receive the money, but that it was not the Bank that had ordered it; it may be I said that, but I don't remember—I cannot recollect—and I think it is not true that the Bank gave me instructions not to deliver such sugar because Mr. Quinones had to deposit the money first; neither can I recollect having said to Don Tomás Quinones that I could not deliver the sugar because the Bank had ordered me not to deliver it; I do not deny that; I was acting under instructions from Mr. Valdés.

I have been for eight years employed in the Central Ana María, during all the time in which Messrs. Valdés have managed it. In 1913 and 1914 there were during the grinding season small quantities of sugar which remained unpledged, but at the end of the season all the sugar was pledged. I cannot say now that the Ana María Sugar Company pledged its sugar in 1913; at that time I was cashier of the Central, and as such had no knowledge of the operations; I only had knowledge of cash operations, and of some other operations, but not of all of them. I kept the books, and made the entries on them; I cannot remember whether in entries made in 1913
91 I stated that sugar had been pledged; I don't remember having made entries on the books relative to sugar sold to Mr. Tomás Quinones in 1913.

As bookkeeper and cashier of the Ana María Sugar Company in 1913, I don't remember whether or not any sugar was pledged, as to 1914, I remember a little, although not all; I testified that during the grinding season we had every week, more or less, four or five hundred sacks not pledged, as it was the product of the work of only a part of a week, but at the end of the grinding season I remember that we had to pledge it all; I know this because I used to keep the books of the corporation, and I knew from the books that the sugar was pledged; these were the same books kept by me in 1913.

Questioned by counsel for defendant, witness answered:

I cannot recollect whether or not, at the end of the grinding season of 1913, there remained any sugar in the storehouse of the Central. I remember the pledge of the sugar of 1914, as it is more

recent than 1913. I don't remember whether in 1913 any sugar was stored in the Central for the purpose of speculation.

Testimony Under Oath of Alejandro G. Monefeldt.

Witness ALEJANDRO G. MONEFELDT, under oath, and questioned by counsel for defendant, answered:

I am the attorney in fact of the house of Don Tomás Quiñones, and in August, 1914, I was also the correspondent, in charge of the correspondence and of the office in general, which work I performed personally.

In regard to the letters which are written in the office, I generally talk with Mr. Quiñones what should be answered. If it was necessary, and if I knew it motu proprio, I would answer in accordance with my judgment or talked the matter over with Mr. Quiñones.

The letter dated August 7, 1914, marked "Plaintiff's Exhibit G," was written by me after consulting Mr. Quiñones, who gave me his ideas and I also used my judgment. I wrote it on a Remington typewriter; I identify it as written by me. I write the correspondence on a typewriter, then I sign it all and give it to Mr. Quiñones for approval, and he reads it before it goes out in order to see if he agrees therein or not. In regard to that letter, Mr. Quiñones and I talked over all the particulars contained in it; it was written in accordance with instructions from Mr. Quiñones. In the house of Mr. Quiñones sometimes fifteen, twenty or twenty-five letters are written; at times only three or four, it depends on the amount of work on hand. We have never had a stenographer or typewriter in the house; I wrote the letters myself. After that letter was signed, it was placed on Don Tomás' desk, was then copied together with the others, the envelopes were sealed and then taken to the post office. I put that letter in Don Tomás' desk so that Don Tomás might see it.

92

At this point counsel for plaintiff admits that the letter was written; was seen by Mr. Quiñones; was opened; was copied and sent to the Post office, and was put in Mr. Quiñones' desk.

Witness proceeds:

That letter was half or a quarter of an hour in Don Tomás Quiñones' desk until it was sealed and sent to the post office, and it was copied in the copying book, which is kept in a small iron box. This copying book is taken every morning from the box and put for all the day in the copying table, and at the end of the day it is again put in the box. There is a boy in charge of copying the letters, and then gives them to me to be sealed.

On cross-examination by counsel for plaintiff, witness answered:

All those persons taking part in the handling of the correspondence are employés of the house; no person foreign to the house takes any part in such handling of the correspondence. Nobody in the

office uses Mr. Quinones' desk for any purpose. Mr. Quinones is the only one using it. Everybody minds his own business. The custom of showing all letters to Mr. Quinones for approval is a
93 general custom in the office. The boy in charge of copying the letters is a permanent employé of the office. The room used for copying letters is not open to the public, no one can go in there in order to read the letters. The table where the copying book is put is in a corner of the office; there is the press and the table, which is situated in the interior part of the office. A person who is not an employé of the office cannot get in there, as, he having to pass before us, we would not allow him to do so. Such copying things are in the interior of the office. It is not a custom of the house to let foreigners read the correspondence. During the night the copying book is kept in a small iron box, with a key; the key is kept in the office, and the office is closed at night; employé Girante keeping the key to it. The copying book is kept out of the box during office hours, and at the end of the day all the books are kept, and during lunch time the copying book is left on the table, but the office is closed, and it would be necessary to force and break the door in order to be able to read it.

In answer to questions from the judge, witness answered:

The door of the office has never been forced. That copying book has already been filled up, and others have been used. That one is kept; because when one book is finished it is kept. It may be that book was finished in a month or so, as they do not last very much—two or three months.

Testimony Under Oath of Tomás Quinones.

Questioned by counsel for defendant, witness testified:

After the 4th of August, 1914, I have never met Mr. Valdés in my way. Mr. Valdés has discontinued his visits to my house. I don't know whether he has continued being my friend or not. I have seen him in the street. The truth is, that I am not very satisfied of Mr. Valdés' conduct; nevertheless, I do not entertain any hatred towards him. Formerly, when I met him I used to shake his hand and greet him; I have limited this to an inclination of the head and nothing more. I never fail to answer the greeting of any person, even my worst enemy, if he greets me I greet him; of
94 course, I would not have with him intimate dealings and expansions, but courtesy is another thing.

On the 10th of August I was not informed as to the price of sugar, because I do not receive any cablegrams. My business is not so important as to allow me to pay cablegrams. But I knew, more or less, since the war began, the price of sugar, everybody knew it; and on the 10th I knew it, more or less, as, being a merchant, I must be informed as to commercial matters.

Testimony Under Oath of Alfonso Valdés.

Questioned by counsel for defendant, witness answered:

In 1913 the Ana María Sugar Company was not incorporated, it was the property of my father, Don Ramón Valdés, and I was then assistant manager, my father being the manager.

In 1913 the sugar of the Central was pledged during the week. For instance: on Monday so many sacks were manufactured, and on Saturday, that is, the day when money was needed, the sacks were pledged at the Bank, and the money was deposited at the Bank so as to be able to pay the expenses of the week; and when the sale of the sugar is effected, the pledge is liquidated. Thus that year there was no sugar stored at the end of the grinding season, as a few days after the end of the season all the sugar was sold. Thus the season ended in the month of May and the sugar was immediately sold, and then there was no sugar pledged or stored. We have never stored sugar, except last year and this year.

On cross-examination by counsel for plaintiff, he answered:

On or about the 30th of May we had ended the season, and at the time we had sugar which was all sold. In the month of June there was no sugar at the Central Ana María. In June it was all sold. The grinding season ended on May 30, and then the sugar was all shipped to the United States. I can assure that it was in the first half of the month of June, but I can tell exactly by research in the corresponding papers. I cannot say if the last sugar was
95 pledged or not, but it is to be supposed that it was, because on Saturday we needed money, but I would not answer yes or no. The funds for cultivation are raised during the grinding season. Some years we do not go to the Bank for help, we ourselves raise the money. In said year of 1913 we made the cultivation for 1914 with our own funds and with money borrowed. I cannot say definitely if, upon ending the grinding season of 1913, there was a quantity of sugar that was not pledged. On June 7, 1913, I do not remember if we sold any quantities to Mr. Quinones or to any other merchant.

[End of the evidence for the defendant.]

Counter-Evidence of the Plaintiff.

Testimony Under Oath of Alejandro Monefeldt.

Questioned by counsel for plaintiff, he answered:

Between two or three, more or less, in the afternoon of the 5th of August, 1914, Mr. Hiltz called up the house of Quinones by telephone, and he asked me if I had instructions from the house of Quinones to deposit the amount of an order of the Ana María, to

make the payment of a bill for sugar sold to us. The conversation was in English.

Counsel for defendant opposes, because he understands that this is not evidence of rebuttal. Counsel for plaintiff replies: "I am trying to discredit two of the principal witnesses of the defense that stated that it was on the sixth." The court allowed the question to be made, and counsel for defendant took exception, because he understands that such is not the form.

Witness goes on testifying:

Well, Mr. Hiltz asked me if we had orders from the Ana María to deposit there the amount of some sugar that had been purchased from them, to deposit on that day the amount of a bill for sugar that we had bought from them, and I answered, yes, sir; that, in effect, we had received a letter in which they gave us instruc-
96 tions to make that payment, but that they did not fix a certain date, nor was there any agreement about payment in advance, that we had not received the sugar; and Mr. Hiltz replied that if we did not make the deposit on that day, he could not receive it. I positively remember that that was on the 5th of August, 1914, because that same morning we had received, late in the morning, a letter from the Ana María, with the bill for the sugar, which letter was dated the 4th, and when Don Tomás came down to the warehouse in the afternoon, we were commenting the letter for answering it, when Mr. Hiltz called up to make such inquiry, and I answered to him that we had received the letter giving us instructions for payment. On no other day were those instructions varied, nor were we informed that we had to pay some other day—the 6th—or that we had until such and such a date, neither by the Ana María nor by the Bank. That was the only communication we received about ordering the payment.

In the office of Mr. Quiñones the telephone is placed between the desk of Mr. Quiñones and mine. I heard the telephonic conversation that Mr. Quiñones had on the 4th of August, 1914, with regard to this matter. I think the conversation was initiated by Mr. Valdés.

At this point counsel for defendant opposes, because this is direct evidence of the plaintiff; the court admitted it.

Counsel for defendant took exception.

Witness goes on testifying, questioned by counsel for plaintiff:

The conversation was initiated by Mr. Valdés, and in the same I heard absolutely nothing said about depositing or accepting a previous deposit of this sugar in the Bank of Canada.

I perfectly heard what Mr. Quiñones answered over the telephone, and they were talking about a purchase and sale of sugar, and Mr. Quiñones agreed on the price and the manner of delivery.

97 At this point counsel for defendant said:

"I oppose to that."

The honorable judge answered:

"The court admits it."

And counsel for defendant took exception.
Witness goes on testifying:

Only about the price, quantity and delivery, and under these terms Mr. Quinones ordered me to confirm the operation, which is the letter of the 4th written by me.

About that sale nothing more was spoken with Mr. Valdés, either by telephone or personally.

On cross-examination by counsel for defendant, he answered:

That conversation took place on the 4th, after lunch, at about three, and I know that Mr. Valdés was the one that initiated the conversation, because Mr. Quinones answered the call by telephone, and I know that he was speaking to Mr. Valdés, because Mr. Quinones asked: "Who is it speaking?" and he was answered; and then Mr. Quinones said: "Ah, Valdés"; and then I heard what Mr. Quinones said, but I could not hear what Mr. Valdés was saying, because the telephone had a receiver, although by the conversation you can make out the questions. The conversation of Mr. Valdés with Mr. Quinones I could not possibly hear, but I could hear the answers of Mr. Quinones, in which he stated his acceptance of price, number of sacks and manner of delivery.

Questioned by the honorable judge, he answered:

The answers of Mr. Quinones were with respect to price, and he said: "The price you give me is high; I had offered you so much; I accept the price of three twenty-two and a half; they are so many sacks of sugar." And then he asked about delivery, and the other replied, and to the answer Mr. Quinones replied: "I agree
98 that it be delivered up to the end of the week"; that was all I heard.

Questioned by counsel for defendant, he answered:

The reason why I remember this matter in detail, is because of what has come immediately after, on account of which I have had to take good notice of this one operation; and as, after signing the letter, a letter came from the Ana María Sugar Company stating something to the contrary. Therefore, that impresses more the operation upon one's mind; any other operation I would have forgotten in five minutes.

Testimony Under Oath of Tomas Quinones.

Questioned by counsel for plaintiff, he answered:

I remember that Mr. Hiltz testified that I had been to see him at the Bank of Canada on the 6th, and that is not true, because I went to see him on the 5th. I am sure the date I was told that if I did not deposit on that date, the money would not be accepted, was the

5th. I had to go to Mr. Hiltz so that he would explain, in writing, some of the incidents of this matter, as I thought necessary that Mr. Hiltz confirm to me his telephonic conversation with my attorney in fact, and of which the latter had informed me. I asked Mr. Hiltz, among other things, to confirm by letter that telephonic conversation, and the first time he refused. I insisted by letter, and he refused again; then I communicated with the Royal Bank of Canada, with its manager at San Juan, telling him what had occurred to me with the manager here. I then received a letter from San Juan that satisfied me, and then a second letter that was still more satisfactory, because from the meaning of the letter I deduced that they would give me the confirmation, and thereupon I waited seven or eight days and then went to see Mr. Hiltz and insisted upon his giving me the confirmation, and he said he would give it to me, that he had reconsidered the matter, and, in view of the fact that afterwards Mr. Hiltz gave me no answer, I told my attorney in fact, Mr. Monefeldt, to call him and tell him in English that I had not received the testimony of confirmation; and as, even with this, we could not
189 obtain the remittal of the confirmation, I sent Mr. Monefeldt to get personally that letter from Mr. Hiltz, and he could not get it neither; and after that, after a few days, the testimony came by mail; so that I requested Mr. Hiltz on the 8th or 9th of August, and I got it on the 10th of September. I am a patron of the Royal Bank of Canada. Here is my current account for the last three months up to August 31, 1914, signed by the Bank. My account with the Royal Bank of Canada during the month of August, 1914, never went below twenty-five thousand dollars in current account; and besides that current account I had at that time a deposit of more than eleven thousand dollars, which I have had there for a long time, and the receipt I have does not allow me to take the money out except by giving fifteen days' notice in advance. I have had that deposit for two years, and I have it there yet.

Counsel for defendant alleges:

"I again move that all the testimony of the witness be eliminated for not tending to prove any pertinent fact in this case; besides because it does not constitute direct evidence of the plaintiff, and besides because it does not tend to impeach the veracity of any of the witnesses of the defendant."

The judge denies the motion, and counsel for defendant takes exception.

[All the evidence is sealed.]

The court, by agreement of the parties, gives them a term in which to file their respective briefs, and reserves its decision until the 29th of May, 1915, when it renders judgment, in accordance with the opinion in which it is founded, dismissing plaintiff's complaint, with costs, expenses, disbursements and attorney's fees, and also dismissing in all its parts the counter-complaint of the defendant corporation.

Such is the statement of the case that the plaintiff presents to this Honorable Court for consideration, so that it may render its approval to it for such legal effects as may be necessary.

(Signed) LUIS JOSÉ SABATER,
Counsel for Plaintiff.

[68] Notified with service of a copy of the foregoing statement of the case this twenty-third day of August, 1915.

(Signed) LEOPOLDO FELIÚ,
Counsel for Defendant Corporation.

Certificate of the Judge.

I, Charles E. Foote, Judge of the District Court for the Judicial District of Mayaguez, Porto Rico,

Certify, that the foregoing statement of the case is the same that has been presented to me, and I give it my approval, because I find it exact, correct and true; and I hereby order that it should form part of the judgment roll for the appeal made in this civil case, No. 4754, of this District Court.

Given under my hand and the official seal of the court of Mayaguez, Porto Rico, this the twenty-fourth of August, 1915.

(Signed) CHARLES E. FOOTE,
[SEAL.] *District Judge.*

Bill of Exceptions.

On the twenty-seventh day of April, 1915, this case was called for trial before the District Court of Mayaguez, the Honorable Charles E. Foote being judge of same, at one of the regular terms of said court. The parties appeared—plaintiff by his attorneys, José Sabater and Jorge V. Domínguez, and defendant corporation by its attorney, Leopoldo Feliú.

Exception Number One.

Before the parties announced to the court that they were ready for the trial, Attorney Jorge V. Domínguez, on behalf of plaintiff, made the following motion to the court:

"With respect to the amount of the indemnity, plaintiff has sufficient evidence for the court to be able to estimate said amount; but I understand that there is other evidence, which plaintiff has been unable to get, which is as follows: The facts to which the complaint refers occurred in August, and it is necessary to establish the average of the quotations in the New York market, and it is quite difficult to find in Porto Rico conclusive evidence. Plaintiff will offer evidence enough, but if the court understands that the evidence pre-

[69] sented is not sufficient to arrive at an estimate of said damages for that case, plaintiff asks that the court consider the case open to file that other evidence. The reason why it is

not now presented is, that it must be a sworn statement to be taken in New York. Plaintiff is ready to begin the trial, but if, during the course of the same, the court should consider that the evidence with respect to the estimate of the damages is not sufficient to make said appraisal of the damages, that the case be considered as open for evidence to file a statement under oath to be made in New York."

Attorney Feliú, in behalf of defendant corporation, opposed to the above, because he understands that there has been an ample opportunity to come to trial well prepared, and, besides, because it is not settled whether this evidence will be admissible or not, and asked the court not to let the case remain open for introducing sworn statements from any place.

The court denied the motion, as presented, because it understands that it cannot, during the course of the trial, tell the parties that it is not convinced, or that it demands additional evidence with regard to a part of the evidence, which would be impossible for the court to state.

Attorney Domínguez expressed that the idea was not to fill in omissions in the evidence, but only that, with such information, the court could, without calculation, arrive at the amount in controversy.

The court replied: "The court could not make settlements of any kind, because it may happen that the evidence may result absolutely insufficient, and then the other evidence would be to supply the evidence that has not been acquired, that is lacking to the party."

Then Attorney Dominguez asked the court to give him permission to renew the motion during the course of the trial, the court reserving the right to deny it, and the court denied the motion, because it believes that a trial should not be commenced with the idea of suspending it to permit the parties to offer *ano*ther evidence, where there is opposition by the other party.

And attorney for plaintiff took exception, stating that the motion was founded on Section 227 of the Code of Civil Procedure.

And then the trial proceeded.

102 Second Exception.

During the testimony of the first witness for plaintiff, Tomás Quinones, attorney for plaintiff, after the authenticity had been admitted of three letters written in the year 1913, by Tomás Quinones to the Central Ana María, about purchase and sale of sugar, offered in evidence the said three letters, and attorney for defendant corporation opposed *its* [sic] admission, because the matter in them refers to a transaction effected in a very remote date; and, in second place, because that transaction was effected under conditions absolutely different to those of the transaction object of this action, and in third place, because they are letters addressed to the Central Ana María, managing which was Don Ramón Valdés, and not Mr. Alfonso Valdés, who is the person intervening in this suit.

The court sustained the opposition on the same grounds expressed by the party, and plaintiff's attorney took exception.

The letters were marked exhibits L, M and N, and are transcribed in the statement of the case prepared by plaintiff.

Third Exception.

Plaintiff during the trial offered as evidence a sworn statement, made in San Juan by Mr. Arturo Bravo, about quotations in the sugar market in August, 1914; that is, at the time the transactions object of this suit *was* effected. The court, by agreement of the parties, allowed that the sworn statement be read, and that the objections made by defendant while the sworn statement was read be discussed; and so it was done.

Counsel for plaintiff then read the following question:

Can you assure that those quotations are correct, and were the ones that governed in the market on the dates mentioned?

A. The source from which I have obtained the information is, in my opinion, entirely creditable, and I have reasons to entertain the conviction that those were the prices by which were governed the transactions in the New York market during the month referred to.

Counsel for defendant asks that this answer be eliminated, as it does not constitute a direct answer to the question made. "For not being responsive."

103 The court sustains the objection and orders the elimination of the answer, and attorney for plaintiff took exception. The sworn statement was marked "Exhibit R."

Fourth Exception.

During the presentation of the evidence offered by counsel for defendant, a document of pledge was offered in evidence and was marked "Defendant's Exhibit 1," and counsel for plaintiff, before making opposition to said document, cross-examined witness, Mr. Hiltz, who answered as follows:

"The note that appears written with indelible pencil was made by me on the day in which Mr. Valdés brought the document to me, which was the twenty-third day of May, 1914; and counsel for plaintiff then made his opposition for three reasons: The first reason is, that from the document itself it does not appear that the Ana María Sugar Company had no more sugar available on the date on which this sale of articles was made to the Royal Bank of Canada; in the second place, that from the document it does not appear that this contract was in effect on the date of the sale of said quantity of sugar to Mr. Quinones,—that is, on August 4, 1914; and, in the third place, that this document is not pertinent evidence against the allegations of the complaint, nor against plaintiff, unless it be shown that this contract of pledge was notified to Mr. Quinones at the time of making the contract of sale of sugar, and also that Mr. Quinones had at the time knowledge of this contract."

Counsel for defendant at this point asks witness if, on the fourth day of August, 1914, the loan securing the pledge was satisfied or

was yet in effect, and the witness having answered that it was in effect, the court admitted it, and counsel for plaintiff took exception.

And witness went on testifying about the form in which the contract of pledge between the Bank and defendant corporation was made, and counsel for plaintiff took exception to all the questions about these matters put to witness, Mr. Hiltz.

104 Fifth Exception.

When witness, Mr. Hiltz, manager of the Royal Bank of Canada, was testifying for the defendant, counsel for plaintiff cross-examined him, and the witness answered:

Q. You can swear, in a positive manner, that Mr. Valdés had no other sugar at the time of the sale?

A. He had other sugar pledged with the Bank.

Q. Where are the documents of said pledge?

A. In my office.

Q. Were you not asked, six or seven days ago, to bring from the Bank all the documents relative to this pledge? The citation served on you by Mr. Feliú says as follows: "Please extend the citations to the witnesses, residents of this city, expressed herein, to wit, Pedro Grau, A. Monefeldt, A. S. Hiltz, the latter bringing with him the documents and books showing the pledge to the Royal Bank of Canada of the sugar of the Ana María Sugar Company, crops of 1913 to 1914 and of 1914 to 1915, or of any of these in which said sugar was pledged."

The honorable judge said:

"But the party that has not cited a witness cannot blame him for not having brought the document."

Counsel for plaintiff stated:

"Before the presentation of the document I put to him the question of whether Mr. Valdés had other sugar pledged besides that, and he answered yes; the witness was cited to bring all the pledges; I have the right to impeach the veracity of witness."

The court said:

"But you want to blame the witness for not having obeyed, in any event, a citation, and only the party citing him can complain; if you wanted those documents, you should have cited him to bring them. The witness says that he has not brought them, and has no need to state why. You may ask with respect to any other document and, if necessary, cite him to bring it."

Counsel for plaintiff took exception.

105 Sixth Exception.

When Alfonso Valdés was testifying, questioned by counsel for defendant, he answered as follows:

Q. Was all the sugar that the Central had from that crop of 1913 to 1914 pledged, or only a part of it?

A. It was all pledged.

Counsel for plaintiff asked that the answer be eliminated, because it is known that if there is a pledge it must be in writing.

And the court permitted the witness to testify; and counsel for plaintiff took exception.

Such is the bill of exceptions taken by counsel for plaintiff during the trial of this case, and which is now submitted to the consideration of the court, for all legal effects, after it is approved, in the appeal taken from the judgment that was rendered in this case against plaintiff.

(Signed) JORGE V. DOMINGUEZ,
JOSÉ SABATER,
Counsel for Plaintiff.

Mayaguez, June 18, 1915.

Notified with service of a copy of the foregoing bill of exceptions this the 18th of June, 1915.

(Signed) LEOPOLDO FELIU,
Counsel for Defendant Corporation.

Certificate of the Judge.

I, Charles E. Foote, Judge of the District Court for the Judicial District of Mayaguez, Porto Rico,

Certify, that the foregoing bill of exceptions is the same that has been presented to me, and I approve it because I find it exact, correct and true; and I also order that the same form part of the judgment roll in this case to the ends of the appeal established.

Given under my hand and the official seal of the court of Mayaguez, Porto Rico, this twenty-seventh day of August, 1915.

(Signed) CHARLES E. FOOTE,
[SEAL.] *District Judge.*

106 *Certificate of the Transcript by the Attorneys.*

We, attorney José Sabater and Leopoldo Feliú, counsel for plaintiff and for the defendant corporation, respectively, in the above-entitled cause,

Certify, that the foregoing agrees well and truly with their original on file in case No. 4754 of the District Court of Mayaguez, Porto Rico, and that they constitute the transcript of the record in said case; and which we certify to the ends of the appeal established by plaintiff to the Supreme Court of Porto Rico from the judgment rendered by said District Court.

LCDO. JOSÉ SABATER,
Counsel for Plaintiff.
LEOPOLDO FELIÚ,
Counsel for Defendant Corporation.

Mayaguez, P. R., September 14, 1915.

I received a copy of the above transcript, date ut supra.

LEOPOLDO FELIU,
Counsel for Defendant.

Motion No. 881.

In the Supreme Court of Porto Rico.

No. 1388. Civil.

TOMÁS QUINONES GUZMÁN, Plaintiff, Appellant,

v.

ANA MARÍA SUGAR COMPANY, Defendant, Respondent.

Motion to Amend the Record.

To the Honorable Court:

Now appears plaintiff, appellant, herein, through his undersigned attorney, and to the Honorable Court expounds:

That it accompanies herewith, and in due form, a certificate issued by the secretary of the District Court of Mayaguez, in which clearly appears certain involuntary omissions made in the transcript of the record that was filed in this Honorable Court to serve as a basis for the appeal from the judgment rendered in this cause by the District Court of Mayaguez.

107 And, in accordance with the rules of this court, being as they are important and substantial omissions that must be corrected for the better defense of the interests of this party, prays the court to consider it as filed and to add it to the record as a part thereof, to all effects.

And likewise accompanies the original and a copy of the principal brief, according to the terms and rules applicable, to be received by the secretary of that Honorable Court.

(Signed) JORGE V. DOMINGUEZ,
" JOSÉ SABATER,
Attorneys for Plaintiff, Appellant.

District Court of Mayaguez, Porto Rico.

No. 4754. Civil.

TOMÁS QUINONES

v.

ANA MARÍA SUGAR CO., INC.

Indemnity.

Certificate.

I, Francisco Azuar, Secretary of the District Court for the Judicial District of Mayaguez, Porto Rico, hereby certify: That in the above

entitled case judgment was rendered and entered on May 29, 1915; on the 8th of June, 1915, a notice of the motion for a new trial, made by plaintiff and notified to Attorney Leopoldo Feliu, was filed on the same day; on the 19th of June, 1915, plaintiff filed his petition for appeal from the final judgment rendered in this case, which petition was notified on the same day to counsel for defendant; that on the 18th of June, 1915, the statement of the case and the bill of exceptions were filed; on August 9, 1915, the motion for a new trial made by plaintiff was filed and notified to counsel for defendant, which motion was heard on the same day, August 9, 1915, by stipulation of the parties; that on August 23, 1915, which was the
108 date set for the hearing on the approval of the statement of the case, attorneys for plaintiff filed a motion to amend the statement of the case, accompanying specifications as to the insufficiency of the evidence, which motion was dismissed that same day; and on said date, August 23, 1915, the amended statement of the case was filed and notified to counsel for defendant, and it was approved on the next day, August 24, 1915, as to the purposes of the appeal from the final judgment; that on September 30, 1915, the court dismissed the motion for a new trial made by plaintiff, and on October 7, 1915, plaintiff filed and notified counsel for defendant of the petition for appeal from the order denying a new trial.

And at the request of Attorney José Salater, counsel for plaintiff, I issue this certificate, at Mayaguez, under my hand and the seal of this court, on December 13, 1915.

(Signed) FRANCISCO AZUAR,
[SEAL.] *Secretary.*

In the Supreme Court of Porto Rico.

No. 1388. Civil.

Tomás Quinones, Plaintiff, Appellant,

v.

Ana María Sugar Company, Defendant, Respondent.

Appeal from the District Court of Mayaguez, Porto Rico.

Sworn Statement of Service by Mail.

Island of Porto Rico,
District of San Juan, ss:

I, José Alvarez Morión, under oath, in due form, state: That I am of age, resident of San Juan, and that I have no interest in this case; and also that I have today deposited in the mail box of this city, with the necessary postage and duly registered, as per the attached receipt, an envelope containing a true and exact copy of the
109 motion to amend the record filed on this date in the Honorable Supreme Court by plaintiff, appellant, which envelope is

addressed to "Lcdo. Leopoldo Feliú, Mayaguez, Puerto Rico," Mr. Feliú being respondent's attorney of record, and Mayaguez his official residence.

(Signed) J. ALVAREZ MORIÓN.

Affidavit No. 444.

Subscribed and sworn to, before me, by José Alvarez Morión, of age, married, employé, and resident of San Juan, who appeared and whom I know personally, in the city of San Juan, this fourteenth day of December, 1915, of all of which I certify.

PABLO BERGA,
Secretary-Reporter,

(Signed) By LUIS SAMALEA,
Deputy Secretary, Supreme Court.

Letter / Parcel } No. ——— P. O. ———

Received for registration ———, 191 , from Alvarez Navas y Dominguez, addressed to Lcdo. Leopoldo Feliu, Mayaguez.

San Juan, P. R. Registered.
10737. Dec. 14, 1915.

Receipt desired ——— Delivery restricted
{To addressee in person ———
{To addressee in order ———

L class postage prepaid. Postmaster, per A.

110 Department of Justice of Porto Rico.

District Court, Mayaguez.

No. 4754. Civil.

TOMÁS QUINONES

v.

ANA MARÍA SUGAR CO., INC.

Indemnity.

January 8, 1916.

To the Secretary of the Supreme Court of Porto Rico, San Juan, P. R.

SIR: In compliance with an order entered under date of the 7th instant by this District Court in the above-entitled case, I have the pleasure to enclose herewith, duly authenticated, the documents mentioned below, and which were offered as evidence in said case, being made part of the record, to wit:

Exhibit T, — letter dated September 10, 1914, addressed to Mr.

Tomás Quinones, signed by A. H. Hiltz, Manager, confirming a telephonic conversation had on the afternoon of August 5 last past, giving notice of having received instructions from the Ana María Sugar Co., Inc., to accept the sum of $6079.

This document was offered by plaintiff.

Defendant's Exhibit 1, issued in two sheets of paper, and which comprises a contract of pledge of 968 sacks of sugar, subscribed by the Ana María Sugar Co., Inc., A. Valdés, President, in favor of the Royal Bank of Canada.

These documents are forwarded by stipulation of the attorneys for the parties, to form a part of the record on appeal to that court.

Acknowledgment of receipt is requested for record.

Respectfully,

(Signed) FRANCISCO AZUAR, *Secretary.*

111 Ex. T.

The Royal Bank of Canada.

Incorporated 1869.

Mayaguez, P. R., September 10, 1914.

Mr. Tomas Quinones, Mayaguez, P. R.

DEAR SIR: In accordance with the request contained in your letter of the 11th ultimo, we take pleasure in confirming our telephonic conversation had with you on the afternoon of August 5th ultimo, in which we advised you, having received from the Ana María Sugar Co. instructions to receive from you for their account, if presented on that day, the sum of $6079, six thousand seventy-nine dollars.

Hoping that this will be satisfactory to you, we are,

Yours very truly,

(Signed) A. F. HILTZ, *Manager.*

I, Francisco Azuar, Secretary of the District Court for the Judicial District of Mayaguez, Porto Rico, hereby certify:

That the above document, marked "Exhibit T," was offered as evidence at the trial by the plaintiff, in civil case No. 4754, begun before this court by Tomás Quinones v. Ana María Sugar Co., Inc., indemnity, which document was made part of the record in said cause; that by stipulation of the attorneys for both parties, this District Court, on January 7, 1916, entered an order providing that the said original document be forwarded to the Honorable Supreme Court of Porto Rico for the purposes of the appeal taken.

And to make it known, and in compliance with what is ordered, I issue this certificate of authentication, in Mayaguez, this eighth day of January, 1916.

(Signed) FRANCISCO AZUAR, *Secretary.*

DEFENDANT'S EXHIBIT 1.

As a collateral guarantee of a certain loan made by The Royal Bank of Canada to the undersigned Ana María Sugar Co., Inc., for the amount of $7500, as principal, and interest at the rate of 8% —— 19— sells, and assigns to the Royal Bank of Canada, the following merchandise: nine hundred and sixty-eight bags of sugar, each bag of 250 lb., which is now deposited in the store or warehouses of Pagán & Ana María S. Co., situated in ——. The holder of this document shall have absolute ownership of the deposited
112 merchandise, above described, and will be free from any responsibility for claims, against the depositor, endorsers, or previous owner, except charge for transportarion, storage and care for the merchandise as given in guarantee.

It is perfectly understood that if the amount of this loan, its interest and expenses are not paid at maturity, The Royal Bank of Canada is at liberty to require from the depositary the sale of the goods deposited and given in guaranty in sufficient quantity for the payment of the loan, its interest and expenses, The Royal Bank of Canada having preference over any other creditor, except charges for transportation, storage, and preservation of the said merchandise. Such sale shall be made at public auction, without the necessity of judicial intervention and before a public notary.

ANA MARÍA SUGAR CO., INC.
(Signed) A. VALDES, *President.*

Mayaguez, P. R., May 23, 1914.

No. 1771.

Subscribed to, before me, by Mr. Alfonso Valdes, of age, single, proprietor, in his capacity of [sic] Ana María Sugar Co., Inc., resident of San Juan, whom I personally know, in Mayaguez, this twenty-third day of May, 1914.

(Signed) RODOLFO RAMIREZ,
Notary Public.

[25-cent Internal Revenue stamp cancelled by notary's seal.]

I, Francisco Azuar, Secretary of the District Court of the Judicial District of Mayaguez, Porto Rico, hereby certify:—

That this document which comprises a contract of pledge and which was issued in two sheets of paper, and has been marked "Exhibit No. 1," was offered as evidence at the trial by the defendant in civil case No. 4754, begun before this court by Tomás Quinones v. Ana María Co., Inc., indemnity, which document was made part of the record in said cause; that by stipulation of the attorneys for both parties this District Court, on January 7, 1916, entered an order providing that the said original document be forwarded to the Honorable Supreme Court of Porto Rico for the purposes of the appeal taken.

And, to make it known, I issue this certificate of authentication, in Mayaguez, this eighth day of January, 1916.

(Signed) FRANCISCO AZUAR, *Secretary.*

113 EXHIBIT 1*a*.

To the Royal Bank of Canada:

The under-mentioned securities (and any renewals, extensions or substitutions therefor) are lodged with The Royal Bank of Canada as a general and continuing collateral security for the due payment of all advances made or to be made to us by the said Bank, and of all our liabilities, present and future, to the said Bank, interest at the rate of eight per cent per annum, computed in the said Bank's usual manner, costs and expenses; and the said Bank is hereby authorized to realize all such securities as aforesaid in such manner as it may elect, and without notice to or any further consent of the undersigned in the event of any default, in the payment of said advances, liabilities, interest, costs and expenses, the proceeds of bills or notes discounted for us to be considered as advances within the meaning of this instrument.

Al Royal Bank of Canada:

Los — que á continuación se expresan (como también todas las extensiones, prórrogas y substituciones de los mismos), quedan depositados en el Royal Bank of Canada, como garantía general y
me
permanente del pago de todos los anticipos que nos ha hecho dicho
me nos
Banco, o nos ha de adelantar, y de todas nuestras obligaciones actuales ó futuras; con el interés al tipo de — por ciento anual, calculado de la manera que acostumbra el Banco, costos y gastos; y dicho Banco queda por la presente autorizado para vender todos los mencionados valores de la manera que juzgue conveniente y sin tener
del firmante
que dar ptro aviso ó oedir más consentimiento de los firmantes en caso de alguna falta en el pago de los anticipos, obligaciones, intereses, costos y gastos, el producto de letras ó pagarés descontados
mi
para nosotros será desde luego considerado como anticipo ó adelanto en el sentido de lo que aquí queda pactado.

Date fecha.	Particulars.	Amount cantidad.
May 23, 1914.	Bill of sale covering 968 bags of sugar of 250 lbs. ea., warehouse receipts covering above sugar	5800

114

Bags 720 Central Ana María
" 248 Pagán's warehouse.

ANA MARÍA SUGAR CO., INC.

(Signed) A. VALDES, *President*

Dated at Mayaguez, Porto Rico, this twenty-third day of May, 1914.

Fechado en 41 dí.. de

In the Supreme Court of Porto Rico.

No. 1388.

TOMÁS QUINONES, Plaintiff and Appellant,

v.

ANA MARÍA SUGAR CO., INC., Defendant and Respondent.

Appeal from the District Court of Mayaguez.

Order.

San Juan, Porto Rico, January 11, 1916.

The motion filed by plaintiff and appellant to amend the record having been heard on January 10, 1916, it is hereby sustained, and consequently It is ordered, that the record be additioned with the certificate of the Secretary of the District Court of Mayaguez attached thereto; and it is further ordered that the two original exhibits forwarded by said secretary be added to the record for all proper effects.

It was so ordered by the court, and the Chief Justice signs, to which I certify.

(Signed) JOSÉ C. HERNÁNDEZ,
Chief Justice.

(Signed) PABLO BERGA,
Secretary-Reporter.

115 *Opinion of the Supreme Court of Porto Rico.*

Delivered by Mr. Justice Hutchison.

San Juan, Porto Rico, December 19, 1916.

Plaintiff, appellant, hereinafter referred to as plaintiff, brought suit in the District Court of Mayaguez for damages for breach of contract, alleging, among other things:

"That on August 4, 1914, and in the city of Mayaguez, plaintiff bought from defendant 740 sacks of centrifugal sugar, second class, at the rate of three dollars and twenty-two and a half cents per hundred weight ($3.22½), according to the custom of this market, cash value at the moment of delivery.

"That at the request of the defendant itself, and for the exclusive convenience of the latter, plaintiff and defendant agreed that the sugar sold should be delivered to the plaintiff, in lots or partial car-

goes, by the end of the week subsequent to the date of the contract, to wit, the 15th of August, 1914.

"That the defendant, entirely departing from the stipulations of the contract of purchase of the sugar as made, required of the plaintiff, by letter received by the latter on August 5, 1914, that he should make a previous deposit of the total amount as shown by the invoice sent for the sugar sold, amounting to six thousand seventy-nine dollars ($6079).

"That plaintiff notified the defendant corporation by letter, sent on the same day, August 5, 1914, that he was willing to accept the delivery of the article in one single day, and pay the total amount of the price agreed upon at the moment of said delivery.

"That on August 6, 1914, the defendant corporation informed the plaintiff that the contract of sale of the sugar, referred to in the foregoing paragraph, had been cancelled.

"That the defendant corporation has not made the delivery of the sugar sold to the plaintiff, either in part or in whole, and refuses to deliver the same as provided in said contract.

"That plaintiff has always been willing to receive the sugar so sold, and pay for the same the price agreed, upon delivery of the same, and has complied with all the stipulations of the contract.

"That on August 10, 1914, plaintiff legally offered, and in good faith, to make a deposit of the total sum of the invoice already presented and received for the sugar sold, amounting to $6079, instructing to that effect the Royal Bank of Canada in this city
116 of Mayaguez, and that, in spite of this, the defendant always refused to make the delivery of the sugar sold.

"That due solely to the failure of defendant in delivering the sugar sold to the plaintiff, the latter has suffered damages in the amount of $6173.24, that being the amount of the difference in price of the sugar due to the rise that occurred in the week between the 10th and 15th of August, 1914."

Defendant, appellee, hereinafter designated as defendant, after a general denial, set up as new matter:—

"That on or about August 4, 1914, in the city of Mayaguez, Porto Rico, plaintiff and defendant entered into or had certain negotiations as to a sale by the latter to the former of 748 sacks of cane sugar, which was to be carried out in the following terms: Plaintiff was to make a previous deposit on that very day in the Royal Bank of Canada, at Mayaguez, Porto Rico, and in favor of the defendant, of the amount of the purchase price of said sugar, to wit, the sum of $6079, and once the deposit was made the defendant was to deliver the said sugar to the plaintiff in partial lots of 160 sacks, the first by railroad, upon receipt of the order of the Bank to that effect, and the remainder by cart-loads during the week next to the aforesaid date.

"That the stipulation as to the previous deposit of the value for said sugar in the said Bank had to be, and was, a condition previous and precedent to the obligation of making the delivery of the sugar by the defendant to the plaintiff, which was imposed and accepted by the defendant, inasmuch as the said sugar was subject to a contract

of loan of the same with said Royal Bank of Canada, in Mayaguez, according to which contract the defendant could not dispose, in any manner, of said sugar without first making a deposit of the value thereof, and the proper authorization of said Bank, all of which was known to the plaintiff at the time of the said negotiations.

"That plaintiff refused to comply and accept the said prerequisite condition of the prior deposit of the amount of said sugar, and then proposed to the defendant, about the 5th of August, 1914, that the delivery of the sugar, which is the object of said negotiations, and to which this complaint refers, should be made by defendant in one single day, and he should pay the value of same once the delivery of each lot was made, whose offer or proposition was refused by the defendant; and defendant now alleges that plaintiff did not make any payment nor offer to pay or tender on said date the said
117 sum of money which was the value of the sugar sold involved in said transactions, either in part or in whole, or in any manner, and, based upon these considerations, the defendant alleges that the said negotiations never became a contract."

Among other special defenses, defendant also pleaded:—

"That, even if the negotiations had between plaintiff and defendant on said August 4, 1914, constituted a consummated contract binding upon both parties, the said contract was terminated and rescinded by the plaintiff himself in refusing to make a deposit of the amount of the purchase price of the sugar, above mentioned, in the manner stated in said answer, and in making his proposition for delivery of the sugar in a manner and upon a date different from that specified and agreed in the alleged contract, on which the plaintiff bases this suit."

The District Court, on May 29, 1915, rendered judgment in favor of defendant, to the effect that plaintiff take nothing by reason of his suit, and dismiss the complaint.

The trial judge found the following facts, among others, to be have been established by the evidence adduced:—

"That on or about August 4, 1914, plaintiff and defendant entered into a contract by telephone, by virtue of which the latter sold to the former 748 sacks of centrifugal sugar, second class, each sack weighing 252 pounds, at the price of $3.22½ per hundred weight, the said sugar being immediately placed at the disposal of the plaintiff, at the storehouse of the factory, situated in the ward of Salometas, of the Municipality of Mayaguez, to be delivered by the defendant to the plaintiff in the following manner: One hundred and sixty sacks by railroad as soon as defendant received the order for delivery from the Royal Bank of Canada, Mayaguez branch and the remainder during the week next to that of the date of the execution of this contract, and in cart-loads; it being agreed likewise by both parties that the value of said sugar—that is, the sum of six thousand and seventy-nine dollars ($6079)—should be previously deposited by plaintiff in said Bank, and at the disposal of the defendant, so that the latter could make the delivery of the sugar so sold.

"That defendant on the said date sent to plaintiff the invoice re-

garding this negotiation, which document was received by the latter on the next day.

"That the said sugar was, upon the execution of the contract, pledged by the defendant to the aforesaid Bank by virtue of
118 a private document, signed before a notary, under date prior to the execution of said contract of sale, and that defendant could not dispose of said article without previously paying its value or amount to the Bank.

"That plaintiff upon the next day to the execution of the contract,—that is, on the 5th of August, 1914,—and without any reason therefor, by letter addressed to the defendant, informed it of his unwillingness to accept the condition as to the satisfaction of the price of said sugar in the manner agreed on in said contract.

"That in the same letter plaintiff proposed to the defendant that said sugar should be delivered to him, if it so desired, in one single day, without saying or proposing anything as to the manner in which he would pay its value.

"That defendant refused to accept the new condition proposed by the plaintiff, as stated in the foregoing paragraph.

"That defendant, on August 6, 1914, informed the plaintiff by letter sent to him on said date, that the above contract was terminated and rescinded, which was reaffirmed by letter of the 7th of the same month, the defendant having taken this resolution, inasmuch as plaintiff did not comply with the condition stipulated with regard to the payment.

"That plaintiff made no offer to defendant as to the satisfaction of the value of said sugar, as agreed in said contract, nor did he offer to make a deposit, nor did he deposit, the said value for the sugar while the aforesaid contract was continued in force by the defendant.

"That on August 10th of the said year, 1914, and after plaintiff had notified the defendant of his repudiation of the manner of making the payment, and made a different proposition as to the manner of delivery of the article contracted for, it was that the said plaintiff attempted to deposit in the Royal Bank of Canada, Mayaguez branch, the price of said sugar in the sum agreed and by means of a check."

After a careful examination of all the evidence, we find ourselves wholly unable to agree with the trial court in its findings as to the nature of the original agreement, or to avoid the conclusion that plaintiff clearly established the substantial allegations of his complaint above quoted.

A full statement of all the circumstances and the considerations by which we are constrained to hold that the District Court committed such manifest error in this regard as to require a reversal of its judgment, would involve an analysis in detail of all
119 the testimony, would extend this opinion to inordinate length, and would serve no useful purpose.

It will suffice to say that we are thoroughly convinced by the whole record that in the conversation by telephone, on the 4th of August, which constituted the true contract between the parties, nothing whatever was said about a deposit of money as a con-

dition precedent to the delivery of the sugar. The conduct of plaintiff from the beginning to the end of the controversy is entirely consistent with his version of that conversation, is inexplicable upon any other theory, and is wholly inconsistent and irreconcilable with the version of defendant and the theory of the trial court. Without discussing the conduct of the representative of defendant or his motives, we may say that there would seem to be no conceivable motive on the part of plaintiff for the alleged repudiation of his contract, or for his refusal to make the deposit, if in fact he had agreed to do so. He had been anxious to buy the sugar. He had tried to close the deal on the day before and had almost succeeded; but defendant was wary, asked for an hour's time within which to confirm the oral agreement, and took twenty-four hours to consider the matter, without either confirming the agreement or withdrawing his tentative acceptance of the proposition as made. On the 4th plaintiff, accepting an offer made in the course of a telephone conversation, finally agreed to pay $3.22½ for the same sugar he had all but obtained at $3.15 on the 3d, details as to delivery were arranged and the contract thereupon became complete. The market was rising on the 4th and continued to rise. Defendant knew when its letter of confirmation was written that conditions indicated a further advance in prices. Every hour that passed made the contract more valuable to the purchaser and more disadvantageous to the vendor. Plaintiff had many times the sum involved lying idle on deposit in the same bank in which defendant claims he had agreed to deposit the amount of the purchase price. There is no rational explanation of plaintiff's refusal to make such deposit other than the one given by him, to wit: honest indignation at what he regarded as a gratuitous reflection on his financial responsibility and standing implied in the attempted injection into the
120 situation of the stipulation for a deposit as a condition precedent to delivery, contained in defendant's letter confirming the conversation by telephone. It may be that the representative of defendant intended to include the stipulation in the original agreement and believed that he had done so. It may be that he had no desire to avoid or repudiate his contract and that he acted in the utmost good faith throughout. But however this may be, we have no doubt whatsoever that the first notice plaintiff ever had of the proposed requirement as to deposit of the purchase price was contained in defendant's letter confirming the agreement by telephone and after the contract of purchase and sale had been consummated.

Much has been said as to whether the appellant should have delivered or deposited the price for the sugar to put himself in a position to make a claim. It is true that Section 1369 of the Civil Code, relied upon by the appellee, provides that "the vendor shall not be bound to deliver the thing sold, if the vendee should not have paid the price"; but it is also true that said section further says, "or if a period (plazo) for the payment has not been fixed in the contract"; and it appears from the evidence that in the contract made between plaintiff and defendant it was tacitly stipulated that the price should be paid, following the custom in the market, upon delivery of the

article, which was to be transported by defendant, at its own expense, from the factory to the plaintiff's storehouse, in the city of Mayaguez, during the week next ensuing after execution of the contract, such delivery was never made by the defendant. See also Section 1222 of the said code, which provides that "the contracting parties may make the agreement and establish the clauses and conditions which they may deem advisable, provided they are not in contravention of law, morals, or public order."

Defendant also argues at some length in its brief that what plaintiff really seeks to recover is anticipated profits too uncertain, remote and speculative in character to be considered as damages herein, in the absence of any proof of actual contract for the resale of the sugar of which defendant had notice at the time of the sale.

121 But plaintiff claims no special damages by reason of frustrated agreements for resale or other exceptional circumstances unknown to defendant. Plaintiff had been doing business in Mayaguez for many years, speculating in sugar and coffee, and had previously bought sugar of defendant in the same way and upon the same terms and conditions as in the instant case, paying for it upon delivery after weighing and inspecting the same. The sugar involved herein was a very small portion of what defendant itself was holding for higher prices in its factory and warehouses, and there is evidence tending to show that at least one of the motives for the sale upon the part of the vendor was the want of storage capacity, and a desire to relieve the congested condition of its factory warehouse, a part of the sugar so sold, in fact, being already loaded upon a freight car for want of suitable space elsewhere. The deal itself was based upon current quotations from the New York market insofar as known at the time, and the question of a fluctating market was plainly in the minds of both parties. The testimony as a whole leaves no room for doubt that prospective profit or loss according to the rise or fall of prices in the New York market was clearly within the contemplation of the parties.

"The grounds upon which is founded the general rule of excluding profits in estimating damages are: (1) that in the greater number of cases such profits are too dependent upon numerous and changing contingencies to constitute a definite and trustworthy measure of damages; (2) because such loss of profits is ordinarily remote and not the direct and immediate result of a non-fulfillment of the contract; (3) the engagement to pay such loss of profits, in cases of default in performance, does not form a part of the contract, nor can it be said, from its nature and terms, that it was within the contemplation of the parties. Cases arise, however, in which loss of profits is said to be clearly within the contemplation of the parties, although not provided for by the terms of the contract, and where such profits are not open to the objection of uncertainty or remoteness. An instance of the latter kind is where the contract is entered into for the purpose, in part at least of enabling the party to fulfill a collateral agreement from which profits would arise, of the existence of which he informed the other party

122 prior to the making of the contract. In such cases the loss of profits from the collateral agreement is clearly within the contemplation of the parties, and is not remote or speculative.

"If a vendor fails to deliver property pursuant to his contract, the vendee, having paid for it, is deprived of such benefit, as such sale completed would have conferred, which is a loss equal to the value of the property at the time it should have been delivered, with interest from that time. This value can generally be provided with certainty. If the property has not been paid for, the compensation is still adjusted with reference to the value, and is the difference between the contract price and the value. Thus, the vendee is entitled to recover according to the advantage he would have derived from performance of the contract, namely, the profit he could have made by the bargain. He is entitled to such sum as would enable him to obtain the property, if it is obtainable. On the other hand, where a vendee breaks his contract the property is left on the vendor's hands; his loss is equal to the difference between the contract price and any less sum the property is worth when the vendee was bound to take *any* pay for it. The loss he suffers is the profit he would have made by the completion of the sale."

1 Sutherland on Damages, Third Edition, Section 59, page 187.

"The general measure of damages for breach by the vendor of a contract of sale is compensation, the vendee being entitled to be placed in the same position he would have occupied, had it not been for the breach. This is accomplished, in a great majority of cases by allowing a recovery for the breach of the difference between the contract price and the market price of the property sold, at the time and place of delivery, or at the time of the breach.

"The ground for this rule is that, on failure of the vendor to deliver, the purchaser may go into the market at the time and place of delivery, and supply himself with the same kind of goods at the market price. And the effect, therefore, is, not the recovery of profits which the vendee might have made had it not been for the breach, but merely the giving the vendee what he was entitled to under his contract and the placing him in the position in which he aimed to be placed, so that he can go on in the course originally intended, and make the expected profits or accomplish the expected object."

Note to Quetzkow Brothers Co. v. Andrews & Co., 52 L. R. A. 209.

123 In Porto Rico the law itself specifies the loss of profits as a basis for an action to recover damages. Indemnity for losses and damages includes, according to Section 1073 of the Civil Code, not only the amount of the loss which may have been suffered, but also that of the profit which the creditor may have failed to realize.

In the case at bar it seems that defendant actually sold during the month of August large quantities of sugar at $6.52 apparently in-

cluding the lot already sold to plaintiff at $3.22½. It follows that whether the difference in price be regarded as damages or as the proceeds of a resulting trust, the profit thus actually obtained by defendant on the sugar of plaintiff belongs to the latter, and not to the former. We are not disposed, therefore, to scrutinize very closely the question of what may or may not constitute the most appropriate technical measure of the damages sustained.

Defendant insists that the damages should be assessed, if at all, upon the basis of the difference between the price in New York on August the 4th, when the contract was made, and on August the 6th, when defendant attempted to rescind the agreement by giving notice to plaintiff. Conceding for the sake of argument that it was incumbent on plaintiff to seek other contracts with other parties in order to minimize his damages resulting from the breach by defendant, there would be more force in the contention if defendant had shown in mitigation of damages that plaintiff could have obtained the same amount of sugar elsewhere in Mayaguez, on August the 6th, at New York prices, less the usual discount to cover cost of transportation. In the absence of any such showing, we are inclined to accept the figures of plaintiff based on New York prices at the expiration of the period within which defendant had agreed to deliver the sugar, less the customary discount.

We have not overlooked the question raised by defendant at the threshold as to the sufficiency of the complaint, which we think states facts sufficient to constitute a cause of action.

The judgment appealed from should be reversed, and in lieu thereof judgment should b centered for plaintiff for the amount laid in his complaint, together with interest thereon from and after October 27, 1914, on which date the amended complaint was notified to the defendant, until paid, at the rate of six per cent per annum, without special imposition of costs.

124

(Signed) H. M. HUTCHINSON,
Associate Justice.

Judgment.

San Juan, Porto Rico, December 19, 1916.

This court has carefully studied the transcript of the record and considered the written briefs and oral arguments of counsel for both parties, and for the reasons set forth in the foregoing opinion holds: That it should reverse, and does hereby reverse, the judgment appealed from rendered by the District Court of Mayaguez on May 29, 1915, rendering in lieu thereof other judgment sustaining the complaint and ordering, that Tomás Quinones receives from the defendant, Ana María Sugar Co., Inc., the sum claimed, viz., six thousand one hundred and seventy-three dollars, twenty-four cents ($6173.24), with interest at the rate of six per cent (6%) per annum, from October 27, 1914, on which date the defendant was notified of the amended complaint, without special imposition of costs.

And let a copy of this judgment and of the opinion on which it is based be sent to the said District Court for proper ends.

So we pronounce, command and sign.

(Signed) JOSÉ C. HERNÁNDEZ.
ADOLPH G. WOLF.
EMILIO DEL TORRO.
PEDRO DE ALDREY.
H. M. HUTCHINSON.

I, Pablo Berga, Secretary and Reporter of the Supreme Court of Porto Rico, hereby certify that the foregoing opinion and judgment agree with their original, and in order to annex it to the record, I issue this, in San Juan, Porto Rico, this nineteenth day of December, 1916.

(Signed) PABLO BERGA,
Secretary-Reporter,
By LUIS SAMALEA,
Assistant Secretary.

125 *Petition for Appeal.*

Now comes the above-named defendant and appellee, the Ana María Sugar Company, and feeling itself aggrieved by the judgment or decree made and entered by this Honorable Court on the nineteenth day of December, 1916, reversing the judgment or decree of the District Court for the Judicial District of Mayaguez, Porto Rico, and giving judgment for plaintiff in this case, does hereby appeal from said decree or judgment to the United States Circuit Court of Appeals for the First Circuit, for the reasons specified in the assignment of errors which is filed herewith, and the said appellee respectfully prays that this appeal may be allowed, that the amount of the appeal or cost bond, which this defendant and appellee shall give upon this appeal to stay further proceedings herein, may be properly fixed by this Honorable Court, and that a transcript of the record, papers and proceedings upon which said decree or judgment was made and entered, duly authenticated, may be sent to said United States Circuit Court of Appeals for the First Circuit, and that upon the filing of said security and bond, execution of said decree or judgment may be stayed, and a citation may duly issue addressed to the plaintiff and appellant, citing and admonishing him, and also his attorneys of record, to be and appear before the said United States Circuit Court of Appeals for the First Circuit, then and there to show cause, if any they have, why the said decree, rendered as aforesaid, should not be reversed or corrected, and why speedy justice should not be done to the parties in that behalf; and this defendant and appellee will ever pray.

(Signed) LEOPOLDO FELIÚ,
Attorney for the Defendant and Appellee.

Assignment of Errors.

Comes now the defendant and appellee in the above-entitled cause, the Ana María Sugar Company, and files the following assignment of the errors upon which it will rely upon its appeal from the judgment or decree made and entered by this Honorable Court on the nineteenth day of December, 1916, in the above-entitled cause:

126 I. That the Supreme Court of Porto Rico erred in holding and deciding that the plaintiff's complaint states facts sufficient to constitute a cause of action.

II. That the said court erred in holding and deciding that the said plaintiff, Tomás Quinones, had proved the essential or substantial allegations of his complaint.

III. That the said court erred in holding and deciding that the condition that the plaintiff was to deposit the price or value of the sugar alleged to have been sold, subject to the order and for the account of defendant, as a condition precedent to the delivery of said sugar, was not embodied in the contract made by the parties, nor agreed to by plaintiff.

IV. The said court erred in holding and deciding that said sugar was to be paid for upon its delivery and not prior thereto.

V. That said court also erred in holding and deciding that the time for payment of said sugar, as stated in the preceding assignment, was fixed by local custom, and impliedly agreed to by the parties herein in their said contract.

VI. That said court further erred in reviewing the evidence in this case and overruling and reversing the finding of facts made by the trial court upon the condition precedent for the payment of said sugar.

VII. That the said court erred in failing to consider and give due weight to the fact, proved in the record, that upon closing the said alleged contract, the defendant herein, by notice in writing, placed the said sugar at the disposal of plaintiff.

VIII. That said court erred in holding and deciding that the defendant herein made no delivery of the sugar alleged to have been sold by it to plaintiff.

IX. That said court erred in failing to consider and give weight and effect to the fact, as proved in the record, that plaintiff made no tender of the price of said sugar to the defendant, and that said sugar was pledged to the Royal Bank of Canada.

X. That said court also erred in holding and deciding that plaintiff herein was entitled to damages by way of compensation.

127 XI. That said court erred in holding and deciding that the profits arising out of the rise of the price of the sugar in the New York market was contemplated by the parties at the time of the making of the said alleged contract.

XII. That the said court erred in allowing compensation to the plaintiff based upon the difference between the contract price and the price of the said sugar in the New York market at the end of the term alleged to have been contracted for its delivery.

XIII. That said court erred in holding and deciding in effect that the plaintiff was not, in this case, under obligation to seek, or make reasonable efforts to acquire sugar of the same kind alleged by him to have been bought from defendant, in the locality where he was doing business and from other parties.

XIV. That the said court erred in holding and deciding in effect that the defendant, the Ana María Sugar Company, broke its said pretended contract with the plaintiff above named.

XV. That said court further erred in giving judgment for the plaintiff, upon the facts proved in the record, and that said judgment is contrary to law and the facts as proved in the record hereof.

Wherefore, the said defendant, the Ana María Sugar Company, prays that the judgment of the said court be reversed, and that this defendant may be awarded and granted whatever other relief may be proper in the premises upon the facts and the law of this case.

(Signed) LEOPOLDO FELIÚ,
Attorney for the Defendant.

Order.

San Juan, Porto Rico, February 13, 1917.

The appeal taken by Attorney Leopoldo Feliú in behalf of Ana María Sugar Company, Inc., to the Circuit Court of Appeals for the First Circuit of the United States from the judgment rendered by this court on December 19, 1916, in the above-entitled cause, is hereby admitted; the amount of the bond, to be furnished by the
128 appellant within the term of five days, to obtain a stay of the execution of the judgment rendered by this court, and to answer for any damages that might be caused to the appellee by virtue of the appeal and of the stay of the execution of the judgment, is fixed in the sum of $10,000; and it is likewise fixed in the sum of $300, the bond to be filed by said appellant to answer for any costs which might be incurred by the appellee by reason of the appeal. And let the said Circuit Court be furnished with a complete copy of the transcript of the record forwarded to this court by the District Court of Mayaguez, for the purposes of the appeal and other proceedings.

It was so decreed by the court, and the Chief Justice signs.

(Signed) JOSÉ C. HERNÁNDEZ,
Chief Justice.

PABLO BERGA,
Secretary-Reporter.

Cost and Supersedeas Bond on Appeal.

Know all men by these presents, that we, Ana María Sugar Company, by its president, Alfonso Valdés, as principal, and Ramón Valdés Cobián and Gabriel Guerra, as sureties, are held and firmly bound unto the above-named plaintiff and appellee, Tomás Quinones, in the full and just sum of three hundred dollars, to answer for all costs on appeal, and in the further full and just sum of ten thousand

dollars, to answer for all damages that may arise by reason of said appeal and of the stay of execution on the decree or judgment herein rendered by this Honorable Court, to be paid to the said Tomás Quinones, his attorneys, representatives, executors, assigns and administrators, and to the payment of which said sums, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Signed with our hands, and dated this twentieth day of February, A. D. 1917.

Whereas, lately at a session of the said Supreme Court of Porto Rico, in a certain suit pending in said court between Tomás Quinones, as plaintiff and appellant, and the Ana María Sugar Company, as defendant and appellee, a decree or judgment was rendered against the said defendant and appellee, the said Ana María Sugar Company, and the latter has obtained an order allowing an
129 appeal to the United States Circuit Court of Appeals for the First Circuit, to reverse the said decree or judgment in said suit rendered, and a citation being about to be issued and directed to the plaintiff, and now appellee, Tomás Quinones, citing and admonishing him to be and appear at a session of the said Circuit Court of Appeals for the First Circuit, to be holden at the city of Boston, Massachusetts, United States of America.

Now, therefore, the condition of the above obligation is such, that if the said Ana María Sugar Company, defendant and appellant, in said appeal shall prosecute its said appeal, to effect, and answer for all costs and damages, as aforesaid, if it fails to make *his* said appeal and plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

(Signed) ANA MARIA SUGAR COMPANY,
By A. VALDÉS, *President.*
" GABRIEL GUERRA, *Surety.*
" R. VALDÉS, *Surety.*

Ramón Valdés Cobián (surety) and Gabriel Guerra(surety), the sureties named in the above bond, and who had signed the same, being first duly sworn, each for himself says: That he is a freeholder and resident within the Island of Porto Rico, and that each is worth the total sum of said bond, viz., the sum of ten thousand and three hundred dollars, over and above all his just debts and liabilities, exclusive of the property exempt from execution.

(Signed) R. VALDÉS, *Surety.*
GABRIEL GUERRA, *Surety.*

No. 4846.

Subscribed and sworn to before me by Ramón Valdés Cobián and Gabriel Guerra (the sureties) both of age, freeholders, residing at San Juan, Porto Rico, and to me personally known, this twentieth day of February, A. D. 1917.

(Signed) CELESTINO IRIARTE, Jr.,
[NOTARIAL SEAL.] *Notary Public.*

[Internal Revenue Stamp of 25 cents]

Order.

San Juan, Porto Rico, February 21, 1917.

After examining the bond for $10,000 and $300 furnished by the Ana María Sugar Company, as principal, and Ramón
130 Valdés Cobián and Gabriel Guerra, as sureties, to answer for any damages which might be caused to the plaintiff, Tomás Quinones, by virtue of the stay of the execution of the judgment and for the costs of the appeal, and the same complying with all the legal requirements, it is approved, and the stay of the execution of the judgment rendered by this court on December 19, 1916, is hereby decreed. The secretary of this court will issue a writ to the District Court of Mayaguez notifying the same of the order of suspension of the execution of the said judgment.

It was so decreed, and the Chief Justice signs; attest.

(Signed) JOSÉ C. HERNANDEZ,
Chief Justice.

PABLO BERGO,
Secretary-Reporter.

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to Tomas Quinones and Jose Salater, Jorge V. Dominguez and Francisco Soto Gras, his attorneys:

You are hereby cited and admonished to be and appear at and before the United States Circuit Court of Appeals for the First Circuit, at Boston, Massachusetts, within sixty days from the date of this writ, pursuant to an appeal filed in the office of the secretary-reporter of the Supreme Court of Porto Rico, in a certain cause lately pending in said court, wherein Ana María Sugar Co., Inc., is defendant and appellant, and Tomás Quinones is plaintiff and respondent, to show cause, if any there be, why the judgment rendered by this court in the said case, on the nineteenth day of December, 1916, against the defendant and appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honoralde Jose C. Hernandez, Chief Justice of the Supreme Court of Porto Rico, at the city of San Juan, Porto Rico, this twenty-third day of February, 1917.

JOSÉ C. HERNANDEZ,
Chief Justice.

131 Attest:
PABLO BERGA,
Secretary-Reporter, Supreme Court.
JORGE V. DOMÍNGUEZ,
Attorney for Appellee.

figs.

Tribunal Supremo de Puerto Rico.

Oficina del Marshal.

Recibido la presente citación en 24 Febrero, 1917, queda debidamente diligenciada remitiendo copia fiel de la misma por correo certificado a Don Tomás Quinones en Mayaguez, Puerto Rico, y entregando además copia de la referida citación a Don Jorge V. Dominguez, abogado del apelado, en San Juan de Puerto Rico, a 26 de Febrero de 1917.

S. C. BOTHWELL, *Marshal,*
By FELIPE JANER, Jr., *Deputy.*

[*Translation.*]

Supreme Court of Porto Rico.

Office of the Marshal.

Received this citation on February 24, 1917, and served the same by sending a true copy thereof, by registered mail, to Mr. Tomás Quinones, residing in Mayaguez, Porto Rico, and by delivering also a copy of the said citation to Mr. Jorge V. Dominguez, attorney for the respondent, in San Juan, Porto Rico, this twenty-sixth day of February, 1917.

S. C. BOTHWELL, *Marshal,*
By FELIPE JANER, Jr., *Deputy.*

Received and Registered { Article No. 16507 ——, 191-.
{ L class postage paid.
From F. Janer, Jr.
Addressed to Tomás Quinones, Mayaguez.
Return receipt desired——
Delivery restricted { To addressee in person——
{ To addressee or order——
Postmaster, per C.

132 [Stamped on face:] San Juan, P. R., Feb. Postmark 24 1917 Registered.

Translator's Certificate.

I, Angel Arroyo Rivera, official translator and interpreter of the Supreme Court of Porto Rico, do hereby certify:

That the foregoing is a true and faithful translation of their respective originals, as the same appear from the original record of this case in this court.

In testimony whereof, I have signed this certificate in the city of San Juan, Porto Rico, this thirteenth day of July, 1917.

ANGEL ARROYO RIVERA,
Interpreter and Translator of the Supreme Court of Porto Rico.

Clerk's Certificate.

I, Pablo Berga Ponce, Secretary-Reporter of the Supreme Court of Porto Rico, do hereby certify:

That the foregoing papers and proceedings had in the above-entitled case are true and faithful copies of their respective originals as the same appear on file and of record in this office and embodied in this transcript by Ana María Sugar Company, Inc., appellant. I further certify that the translation of said papers and proceedings has been revised by the official translator and interpreter of this court, as shown by his certificate hereto attached and made a part of this transcript.

In testimony whereof, I have hereunto set my hand and affixed the seal of this court, in the city of San Juan, Porto Rico, this twenty-seventh day of July, 1917.

[SEAL.] PABLO BERGA,
Secretary-Reporter of the Supreme Court of Porto Rico.

[$33.25 in Excise Stamps cancelled.]

133 *Order.*

San Juan, Porto Rico, April 12, 1917.

Upon motion duly made by attorney for appellant, the time for the filing in the United States Circuit Court of Appeals for the First Circuit of the transcript of the record in this case is hereby extended until June 22, 1917.

It was so ordered by the court, and the Chief Justice signs, to which I certify.

(Signed) JOSÉ C. HERNÁNDEZ,
Chief Justice.

(Signed) PABLO BERGA,
Secretary-Reporter.

A true copy.

[SEAL.] PABLO BERGA,
Secretary-Reporter,
Supreme Court.

Order.

San Juan, Porto Rico, June 14, 1917.

Upon motion duly made by attorney for appellant, the time for the filing in the United States Circuit Court of Appeals for the First Circuit of the transcript of the record of this case is hereby extended until July 22, 1917.

It was so ordered by the court, and the Chief Justice signs, to which I certify.

(Signed) JOSÉ C. HERNÁNDEZ,
Chief Justice.

(Signed) PABLO BERGA,
Secretary-Reporter.

A true copy.

[SEAL.] PABLO BERGA,
Secretary-Reporter,
Supreme Court.

134 *Order.*

San Juan, Porto Rico, July 17, 1917.

Upon motion duly made by attorney for appellant, the time for the filing in the United States Circuit Court of Appeals for the First Circuit of the transcript of the record of this case is hereby extended until August 7, 1917.

It was so ordered by the court, and the Acting Chief Justice signs, to which I certify.

(Signed) ADOLPH G. WOLF,
Acting Chief Justice.

(Signed) PABLO BERGA,
Secretary-Reporter.

A true copy.

[SEAL.] PABLO BERGA,
Secretary-Reporter,
Supreme Court.

United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1295.

Ana Maria Sugar Co., Inc., Defendant, Appellant,

v.

Tomas Quinones, Plaintiff, Appellee.

Appeal from the Supreme Court of Porto Rico.

Before Bingham, Johnson, and Brown, JJ.

Opinion of the Court.

June 6, 1918.

Bingham, *J.:*

This is an action to recover damages for breach of contract. It was brought in the District Court of Mayaguez, Porto Rico. In the complaint it was alleged that the plaintiff was a merchant doing business in the city of Mayaguez, and that the defendant was a corporation having a place of business in that city; that on August 4, 1914, in that place the plaintiff bought from the defendant 740 sacks of centrifugal sugar, second class, at the rate of $3.22½ per hundred weight, which, according to the custom of the market, was to be paid for cash on delivery, the same to be delivered on or before the 15th of August, 1914; that thereafter the defendant refused to deliver the sugar unless the plaintiff should previously deposit in the Royal Bank of Canada, at Mayaguez, the sum called for by the invoice for the sugar sold, amounting to $6,079; that the defendant failed to deliver the sugar either in part on in whole, refused to deliver the same as provided in said contract; that the plaintiff has always been ready and willing to receive the sugar, to pay the price agreed upon delivery of the same, and comply with all the stipulations of the contract; and that, by reason of the defendant's failure in the premises, plaintiff has suffered damages in the sum of $6,173.24, that being the difference in the price of the sugar due to the rise in the market.

The defendant in its answer denied each and every allegation stated in the complaint, and, as new matter, set forth that the contract of August 4, 1914, was for 748 sacks of cane sugar; that one of the terms of the contract was that the plaintiff was to make a deposit on that day in the Royal Bank of Canada, at Mayaguez, in favor of the defendant for the purchase price of said sugar, to wit, the sum of $6,079, and that thereupon the defendant was to deliver the sugar to the plaintiff in partial lots of 160 sacks, the first by railroad upon receipt of the order of the bank to that effect, and the remainder by cart loads during the week next to the aforesaid date; that the provision as to deposit in the bank was a condition precedent to its obliga-

tion to deliver the sugar and was imposed and agreed to for the reason that the sugar was subject to a lien to the Royal Bank of Canada, and that the plaintiff failed to comply with this condition.

A trial was had before the District Judge, who found that, on August 4, 1914, the plaintiff and defendant entered into a contract by telephone for the purchase and sale of 748 sacks of centrifugal sugar, second class, each sack to weigh 252 pounds, at the price of $3.22½ per hundred weight, to be delivered to the plaintiff in the following manner: One hundred and sixty sacks by railroad as soon as the defendant received the order for delivery from the Royal Bank of Canada, and the remainder to be delivered in cart loads during the week following the making of the contract; that it was agreed that the price of said sugar—$6,079—should be first deposited by the plaintiff in the Royal Bank of Canada, at Mayaguez, to the defendant's credit; that at the time of the execution of the contract the sugar was pledged to the bank; that the plaintiff, without excuse, on the day following the execution of the contract, notified the defendant that he was unwilling to accept the condition as to payment of the purchase price, and that the defendant, on August 6, informed the plaintiff that the above contract was terminated and rescinded for failure to comply with the condition as to payment, which it had a right to do. Having found these facts, the District Judge entered judgment dismissing the complaint, with costs to the defendant. Thereupon the plaintiff appealed to the Supreme Court of Porto Rico.

The appeal record embodied the pleadings in the case, the entry of judgment, the opinion of the District Judge embodying the findings of fact and rulings of law, a "statement of the case" setting forth the evidence, oral and documentary, introduced at the trial, which the District Judge certified to be correct and ordered to form a part of the judgment roll for the appeal. There was also a bill of exceptions setting forth in detail the exceptions taken by the plaintiff to the rulings of the District Judge at the trial, which was certified by him as correct, and ordered to form a part of the judgment roll on the appeal. In the Supreme Court the record was amended by the addition of certain documents which had been introduced in evidence, but omitted from the record sent up from the court below, through mistake.

The Supreme Court reviewed the evidence and found that the plaintiff had "clearly established the substantial allegations of his complaint"; that the District Court had committed "such manifest error * * * as to require a reversal of its judgment"; "that they were thoroughly convinced by the whole record that in the conversation by telephone, on the 4th of August, which constituted the true contract between the parties, nothing whatever was said about a deposit of the money as a condition precedent to the delivery of the sugar"; that "the market was rising on the 4th and continued to rise"; that the "defendant knew when its letter of confirmation was written that conditions indicated a further advance in price"; that "every hour that passed made the contract more valuable to the purchaser and more disadvantageous to the vendor"; that "the first notice the plaintiff ever had of the proposed requirement as to the deposit of the

purchase price was contained in defendant's letter confirming the agreement by telephone, and after the contract of purchase and sale had been consummated"; that it appeared "from the evidence that in the contract made between the plaintiff and defendant it was tacitly stipulated that the price should be paid, following the custom of the market, upon delivery of the article, which was to be transported by the defendant, at its own expense, from the [its] factory to the plaintiff's storehouse, in the city of Mayaguez, during the week next ensuing after the execution of the contract," and that "such delivery was never made by the defendant." Upon the question of damages the court found that the "plaintiff had been doing business in Mayaguez for many years, speculating in sugar and coffee, and had previously bought sugar of the defendant in the same way and upon the same terms and conditions as in the instant case, paying for it on delivery after weighing and inspecting the same"; that "the deal itself was based upon current quotations from the New York market in so far as known at the time, and the question of a fluctuating market was clearly in the minds of both parties"; that "the testimony as a whole leaves no room for doubt that prospective profit or loss according to the rise or fall of prices in the New York market was plainly within the contemplation of the parties," and that they were "inclined to accept the figures of the plaintiff based on the New York prices at the expiration of the period within which the defendant had agreed to deliver the sugar, less the customary discount." It ruled that, according to Section 1073 of the Civil Code, indemnity for losses and damages included "not only the amount of the loss which may have been suffered, but also that of the profit which the creditor may have failed to realize"; and it further found and ruled that the "defendant actually sold during the month of August large quantities of sugar at $6.52, apparently including the lot already sold to plaintiff at $3.22½;" and that, "whether the difference in price be regarded as damages or as the proceeds of a resulting trust, the profit thus actually obtained by the defendant on the sugar of plaintiff belongs to the latter and not to the former.

It also ruled that the complaint stated facts sufficient to constitute a cause of action. Having made these findings and rulings, judgment was entered for the plaintiff for $6,173.24.

From this judgment the defendant appealed to this court and produces here a transcript of the record as forwarded to the Supreme Court of Porto Rico, together with the opinion of that court embodying the findings of fact above set forth, and the judgment entered thereon, certified by the secretary and recorder of the Supreme Court as agreeing with their originals; and also an assignment of errors in which the defendant complains that the Supreme Court erred (1) in holding that the plaintiff's complaint states facts sufficient to constitute a cause of action; (2) that the plaintiff had proved the essential allegations of his complaint; (3) in finding that the contract did not provide for a deposit of the purchase price as a condition precedent to the delivery of the sugar; (4) in finding that the sugar was to be paid for upon its delivery, and not prior thereto; (5) in finding that the time of payment was fixed by local custom and impliedly agreed to by the parties; (6) in reviewing the evidence and

reversing the finding of fact made by the trial court as to the payment being a condition precedent to the delivery; (7) in failing to consider and give due weight to a certain writing introduced in evidence; (8) in finding that the defendant made no delivery of the sugar; (9) in failing to consider and give due weight to the fact that the plaintiff made no tender of the price of said sugar to the defendant and that said sugar was pledged to the Royal Bank of Canada; (10) in holding that plaintiff was entitled to damages by way of compensation; (11) in finding that the profits arising out of the rise of the price of the sugar in the New York market was contemplated by the parties at the time of the making of the contract; (12) in awarding compensation to the plaintiff based upon the difference between the contract price and the price of the sugar in the New York market at the end of the term alleged to have been contracted for its delivery; (13) in holding that the plaintiff was not under obligation to make reasonable efforts to acquire sugar of the same kind in the locality where he was doing business, and from other parties; (14) in holding and finding that the defendant broke its contract with the plaintiff, and (15) in giving judgment for the plaintiff upon the facts proved in the record.

According to the act of April 12, 1900 (31 Stat. at L., p. 85, c. 191, s. 35), known as the Foraker Act, writs of error and appeals from the final decisions of the Supreme Court of Porto Rico to the Supreme Court of the United States were allowed "in the same manner and under the same regulations and in the same cases as from the supreme courts of the territories of the United States," and it was held that, whether the method adopted was writ of error or appeal, the jurisdiction of the Supreme Court of the United States to revise the proceedings below was confined to determining whether the facts found by the Supreme Court of Porto Rico supported its judgment and whether there was material and prejudicial error in the admission or rejection of evidence, manifested by exceptions duly certified. In other words, upon appeal, as well as writ of error, its jurisdiction was limited to reviewing questions of law. Rosaly v. Graham, 227 U. S. 584, 589, 590; Monagas v. Albertucci, 235 U. S. 81. This act was, however, in 1911, superseded by Section 244 of the Judicial Code. Under the latter act, proceedings equitable in nature were required to be prosecuted from the Supreme Court of Porto Rico to the Supreme Court of the United States by appeal, and the jurisdiction of the latter court in such case was extended to include a review of questions of fact as well as law (Elzaburu v. Chaves, 239 U. S. 283), while its review of actions at law was by writ of error, the same as from a Federal District Court. By the act of January 28, 1915 (38 St. at L., p. 804, c. 22, s. 3), Congress repealed Section 244 of the Judicial Code, and by Section 2 of that act amended Section 246 of the Code by providing that: "Writs of error and appeal from the final judgments and decrees of the supreme courts of * * * Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of $5,000, may be taken and prosecuted in the circuit courts of appeals."

The cause of action stated in the complaint is, in its nature, an

action at law, and properly should be prosecuted here by writ of error and not by appeal (Metropolitan R. R. Co. v. District of Columbia, 195 U. S. 322); and prior to September 6, 1916, would probably have been dismissed for want of power in this court to review a matter on appeal not of equitable cognizance. But on that date Congress in 39 St. at L., p. 727, c. 448, s. 4, provided:

"That no court having power to review a judgment or decree rendered or passed by another shall dismis a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

We will, therefore, treat the case as though it had been brought here by writ of error instead of by appeal.

On writ of error from a final judgment, errors of law appearing on the face of the record proper (Kansas City Ry. Co. v. Carlisle, 94 Mo. 166; Loeb v. Columbia Township Trustees, 179 U. S. 472, 482; Eldorado Coal & Mining Co. v. Mariotti, 215 Fed. 51, 54; 2 Cyc., pp. 1053, 1055; 3 C. J., p. 899), may be availed of without resorting to a bill of exceptions or other equivalent proceeding. Nalle v. Oyster, 230 U. S. 165; Denver v. Home Savings Bank, 236 U. S. 101; Young v. Martin, 8 Wall. 354, 357; Macker v. Thomas, 7 Wheat. 530, 432; Mitsui v. St. Paul Fire & Marine Ins. Co., 202 Fed. 26, 28; Moline Plow Co. v. Webb, 141 U. S. 615, 623; Aurora City v. West, 7 Wall. 82, 91; Evans v. Stettnisch, 149 U. S. 605, 607; Wilmington v. Ricaud, 90 Fed. 212; United States v. Parrott, 27 Fed. Cas. No. 15,998; 2 Cyc. 1076. But errors in rulings of law occurring in the course of a trial are not a part of the record proper, and in order that they may be reviewed on writ of error by an appellate court must be excepted to at the time they are made (Walton v. United States, 9 Wheat. 651, 657; Railway v. Heck, 102 U. S. 120; Newport News & Mississippi Valley Co. v. Pace, 158 U. S. 36), and incorporated into the record by a bill of exceptions or other equivalent proceeding. Suydam v. Williamson, 20 How. 427, 432, 433; England v. Gebhardt, 112 U. S. 502, 505; Fisher v. Cockerell, 5 Pet. 246, 253; Ghost v. United States, 168 Fed. 841, 842; Stewart v. Wyoming Ranch Co., 128 U. S. 383, 390; Preston v. Prather, 137 U. S. 604; Hildreth v. Grendin, 97 Fed. 970; Rio Grande Irrigation Co. v. Gildersleeve, 174 U. S. 603; Rodriguez v. United States, 198 U. S. 156, 164.

In this case no requests for rulings of law were submitted by appellant (plaintiff in error) to the Supreme Court of Porto Rico, and no exceptions were taken to the rulings made. This being so, no exceptions were preserved by it which could have been embodied in a bill of exceptions, and, as a consequence, no bill of exceptions was filed and made a part of the record. Such being the case, the only questions presented for our consideration and assigned as error are whether the plaintiff's complaint states a good cause of action, whether the Supreme Court exceeded its jurisdiction in making findings of fact and entering judgment thereon, and whether the facts so found support the judgment which it rendered.

I. As to the first question, we think there is no doubt but that the complaint states a good cause of action for a breach of contract.

II. In an act entitled "An act establishing the Supreme Court of Porto Rico as a court of appeals," approved March 12, 1903, it is provided:

"Section 1. That the Supreme Court of Porto Rico shall hereafter be a court of appeals and not a court of cassation. In its deliberations and decisions, in all cases, civil or criminal, said court shall not be confined to the errors in proceeding (procedure) or of law only, as they are pointed out, alleged or saved by the respective parties to the suit, or as set fourth (forth) in their briefs and exceptions, but in furtherance of justice, the court may also take cognizance of all the facts and proceedings in the case as they appear in the record, and likewise consider the merits thereof, so as to promote justice and right and to prevent injustice and delay." Compilation of Revised Statutes and Codes of Porto Rico, p. 241, s. 1141.

This statute vested the Supreme Court with authority to review the evidence contained in the record transferred from the District Court of Mayaguez and make such findings of fact as right and justice required and such rulings of law as were applicable to the case, and it was no doubt under the authority here conferred that the Supreme Court acted in making the findings and rulings that it did. And in the same compilation it is further provided:

"(5350) Sec. 306 (as amended by Act of March 8, 1906, page 164). When the judgment, order or decree of the court below shall be reversed, the court shall proceed to render such judgment, order or decree as the court below should have rendered, except when it is necessary that some matters of facts be ascertained, or the damage to be assessed or the matter to be decreed is uncertain, in any of which cases the cause shall be remanded for a new trial in the court below."

As the question of damages had been fully tried in the court below, and the evidence relating thereto, together with the other evidence introduced at the trial, had been included in the record and transferred to the Supreme Court, we think that it was within the power of that court to examine the evidence and say whether the question of damages could properly be determined therefrom, and, if it concluded that it could, to pass upon the question of damages itself without sending the case back for a new trial upon that issue, and, as said in Burnet v. Desmornes, 226 U. S. 145, 148, "there being no question of the power of the Supreme Court, we should be slow to control its discretion on this point."

III. The facts found support the judgment. It is unnecessary to restate them; they sufficiently appear in what has been above set forth.

The judgment of the Supreme Court of Porto Rico is affirmed, with costs to the appellee (defendant in error).

On April 30, 1918, this case came on to be heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson, Circuit Judges, and Honorable Arthur L. Brown, District Judge, sitting.

Thereafter, to wit, on June 6, 1918, the opinion of the court (page 135) was announced, and the following judgment was entered:

Judgment.

June 6, 1918.

This case came on to be heard April 30, 1918, upon the transcript of record of the Supreme Court of Porto Rico, and was argued by counsel.

Upon consideration whereof, It is now, to wit, June 6, 1918, here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Porto Rico is affirmed, with costs to the appellee (defendant in error).

By the Court,

ARTHUR L. CHARRON, *Clerk.*

Thereafter, to wit, on August 7, 1918, the following mandate issued:

Mandate.

August 7, 1918.

UNITED STATES OF AMERICA, *ss:*

[L. S.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Porto Rico, Greeting:

Whereas, lately in the Supreme Court of Porto Rico, before you, or some of you, in a cause numbered and entitled, No. 4754, Civil, Tomas Quinones, Complainant, v. Ana Maria Sugar Company, Inc., Defendant, the following Judgment was entered December 19, 1916:

Judgment.

SAN JUAN, PORTO RICO, December 19, 1916.

This court has carefully studied the transcript of the record and considered the written briefs and oral arguments of the counsel for both parties, and for the reasons set forth in the foregoing opinion holds: That it should reverse, and does hereby reverse, the judgment appealed from rendered by the District Court of Mayaguez on May 29, 1915, rendering in lieu thereof other judgment sustaining the complaint and ordering that Tomas Quinones receives from the defendant, Ana Maria Sugar Co., Inc., the sum claimed, viz., six thousand one hundred and seventy-three dollars, twenty-four cents ($6,173.24), with interest at the rate of six per cent (6%) per annum, from October 27, 1914, on which date the defendant was notified of the amended complaint, without special imposition of costs. And let

a copy of this judgment and of the opinion on which it is based be sent to the said District Court for proper ends.

So we pronounce, command and sign.

(Signed) JOSE C. HERNANDEZ.
ADOLPH G. WOLF.
EMILIO DEL TORRO.
PEDRO DE ALDREY.
H. M. HUTCHINSON.

And whereas said Ana Maria Sugar Company, Incorporated, appealed from said judgment to this United States Circuit Court of Appeals for the First Circuit, as by the inspection of the transcript of the record in said cause of the said Supreme Court, which was brought into the United States Circuit Court of Appeals for the First Circuit, by virtue of the aforesaid appeal, agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and seventeen, the said cause came on to be heard before the said Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now, to wit, June 6, 1918, here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Porto Rico is affirmed, with costs to the appellee (defendant in error).

Costs in this United States Circuit Court of Appeals for the First Circuit for which execution is to issue from said Supreme Court in favor of said Tomas Quinones, Plaintiff, Appellee, and against said Ana Maria Sugar Company, Incorporated, Defendant, Appellant, are taxed at twenty dollars ($20.00)

You therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the aforesaid judgment of this court, as according to right and justice, and the law of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the seventh day of August, in the year of our Lord one thousand nine hundred and eighteen.

ARTHUR I. CHARRON,
Clerk of the United States Circuit Court of Appeals for the First Circuit.

Costs of Appellee (Defendant in Error).

Attorney $20.00.

(On the back is the following:) United States Circuit Court of Appeals for the First Circuit. October Term, 1917. Ana Maria Sugar Company, Incorporated, Defendant, Appellant, v. Tomas Quinones, Plaintiff, Appellee.

Clerk's Certificate.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 151, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including September 4, 1918, in the cause in said court, numbered and entitled, No. 1295, Ana Maria Sugar Company, Incorporated, Defendant, Appellant, v. Tomas Quinones, Plaintiff, Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this fourth day of September, A. D. 1918.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

(38427)

154 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which Ana Maria Sugar Company, Incorporated, is appellant, and Tomas Quinones is appellee, No. 1295, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Supreme Court of Porto Rico, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and
155 removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26739. Supreme Court of the United States, October Term, 1918. No. 653. Ana Maria Sugar Company, Inc., vs. Tomas Quinones. Writ of Certiorari.

156 *Return on Writ of Certiorari.*

United States Circuit Court of Appeals for the First Circuit

And now the Judges of the United States Circuit Court of Appeals for the First Circuit make return of this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued, "that the certified transcript of the record on file in the office of the Clerk of the Supreme Court of the United States which was sent by the Clerk of this Court to the Supreme Court of the United States at Washington be deemed and taken to be the return to the writ of certiorari issued by the United States Supreme Court to the Judges of the United States Circuit Court of Appeals for the First Circuit on the 31st day of October, 1918, and that a certified copy of this stipulation be sent by said Clerk of the United States Circuit Court of Appeals for the First — as part of said return to said writ of certiorari."

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court at Boston, in said First Circuit, this twentieth day of November, A. D. 1918.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

157 United States Circuit Court of Appeals, First Circuit.

ANA MARIA SUGAR COMPANY, Inc., Appellant,

against

TOMAS QUINONES, Appellee.

It is hereby stipulated by and between the attorneys for the parties hereto that the certified transcript of the record on file in the office of the Clerk of the Supreme Court of the United States which was sent by the Clerk of this Court to the Supreme Court of the United States at Washington be deemed and taken to be the return to the writ of certiorari issued by the United States Supreme Court to the Judges of the United States Circuit Court of Appeals for the First Circuit on the 31st day of October, 1918, and that a certified copy of this stipulation be sent by said Clerk of the United States Circuit Court of Appeals for the First Circuit as part of said return to said writ of certiorari.

It is further stipulated that nothing herein contained shall be construed as a consent on the part of appellee to the issuance of the writ of certiorari, or a waiver of appellee's right of opposition thereto, nor to any motion to dismiss or to quash the said writ on any
158-9 grounds.

Dated, November 16, 1918.

JORGE V. DOMINGUEZ,
Attorney for Appellee.

CURTIS, MALLET-PREVOST & COLT,
Attorneys for Appellant, Ana Maria Sugar Company, Inc.

A true copy:

Attest:

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

160 [Endorsed:] File No. 26739. Supreme Court U. S., October Term, 1918. Term No. 653. Ana Maria Sugar Company, Inc., Petitioner, vs. Tomas Quinones. Writ of certiorari and return. Filed November 21, 1918.

No. 653 2[illegible]54

Supreme Court of the United States

OCTOBER TERM, 1918. No. 653.

IN THE MATTER

of

THE PETITION OF ANA MARIA SUGAR CO., INC., FOR A WRIT OF CERTIORARI DIRECTED TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

ANA MARIA SUGAR CO., INC.,

Petitioner,

against

TOMAS QUINONES,

Respondent.

NOTICE OF MOTION FOR WRIT OF CERTIORARI AND PETITION AND BRIEF IN SUPPORT OF SAME.

CURTIS, MALLET-PREVOST & COLT,
Attorneys for Petitioner,
30 Broad Street,
New York City.

E. CROSBY KINDLEBERGER,
Of Counsel.

The Dispatch Printery & Bindery Corporation
New York

Supreme Court of the United States,

OCTOBER TERM, 1918.

ANA MARIA SUGAR CO., INC.,
Petitioner,

against

TOMAS QUINONES,
Respondent.

Sir:

PLEASE TAKE NOTICE that upon a certified copy of the transcript of the record herein and upon the annexed petition of Ana Maria Sugar Co., Inc., sworn to on the 5th day of September, 1918, and to be filed in the office of the Clerk of the Supreme Court of the United States on the 6th day of September, 1918, I shall make a motion before the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on Monday, October 7th, 1918, at the opening of the Court on that day or as soon thereafter as the Court may hear such motion and counsel can be heard for a writ of certiorari in conformity with the prayer of the petitioner and for such other and further relief as may be just and proper.

Dated, New York, September 5, 1918.

Yours, etc.,

E. CROSBY KINDLEBERGER,
Of Counsel for Petitioner.

To:

JORGE DOMINGUEZ, Esq.,
Attorney for Respondent,
2 Rector Street,
New York City.

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1918.

ANA MARIA SUGAR CO., INC.,
Petitioner,

against

TOMAS QUINONES,
Respondent.

Petition for Writ of Certiorari.

To the Supreme Court of the United States, the Chief Justice and the Associate Justices Thereof:

The petition of Ana Maria Sugar Co., Inc., respectfully shows to this Court:

I. This is a petition for a writ of certiorari to review a final judgment of the Circuit Court of Appeals for the First Circuit made on June 6, 1918, affirming a judgment

made to the plaintiff and that by failure of the delivery of the sugar the plaintiff suffered damages of $6,173.24 due to the rise in the price of sugar in the week between the 10th and 15th of August, 1914.

III. At the District Court of Mayaguez, the District Judge sitting without a jury, after an extended trial, wrote a careful opinion in which he found that the plaintiff had failed to sustain the cause of action alleged in the complaint and that the complaint should be dismissed. The opinion contained fourteen detailed findings of fact and five conclusions of law, the gist of the opinion being that the real contract between the parties provided that payment for the sugar be made in advance and that the plaintiff unreasonably broke the contract by refusing to make such advance payment, the sugar having been pledged by the Ana Maria Sugar Co., Inc., with the Royal Bank of Canada and this advance payment being required to satisfy the pledge so that the sugar could be delivered to the plaintiff free from the claims of the bank.

IV. The respondent, plaintiff below, filed a bill of exceptions and took an appeal to the Supreme Court of Porto Rico, which wrote an opinion analyzing the evidence in detail and not only reversed the judgment of the Court below but awarded an affirmative judgment to the plaintiff for the entire amount of damages demanded in the complaint, a sum greater than the entire market value of the sugar at the time of the alleged contract of sale. The Supreme Court of Porto Rico made no new findings of its own but merely stated in its opinion that it disagreed with the finding of the District Court.

V. The attorney in Porto Rico for the petitioner Ana Maria Sugar Co., Inc., petitioned the Supreme Court of Porto Rico for leave to appeal to the United States Circuit Court of Appeals, First Circuit, and annexed to his petition fifteen assignments of error. The Supreme Court

of Porto Rico thereupon made an order allowing the appeal and fixing a bond pending the appeal with a stay of execution and a citation was issued to the respondent ordering him to show cause before the United States Circuit Court of Appeals, First Circuit at Boston, why the judgment should not be corrected and justice done in the matter.

VI. The case came on before the United States Circuit Court of Appeals on the 30th day of April, 1918, and was fully argued by both counsel and briefed upon the questions of fact and law which were considered by both sides. The petitioner urged in that Court as his points of law:

1. The contract provided that the price of the sugar had to be paid in at the Royal Bank of Canada to release the lien of the bank.

2. An improper measure of damages was adopted by the Supreme Court.

No question was made by the respondent as to the practice adopted, it not being claimed that the appeal was not rightfully brought and the questions of fact not properly presented. The United States Circuit Court of Appeals, First Circuit, on June 6th, 1918, rendered its opinion and judgment based almost entirely upon points of practice, raised by it upon the oral argument for the first time. Judge BINGHAM analyzed the record as respects the power of the United States Circuit Court of Appeals to make any examination whatever of the facts, and held:

(a) That the appeal was improper and that the case would be considered as if it had come before the Court as a writ of error.

(b) That upon the writ of error only errors of law appearing upon the face of the record proper or by bill of exceptions could be considered.

He stated that there being no bill of exceptions in this case which brought up any questions of fact, the only questions before the Court were whether the complaint was sufficient and whether the facts found by the Supreme Court of Porto Rico supported the judgment which it rendered. These questions were then resolved in favor of the respondent.

VII. A matter of great importance to the Bar, affecting all cases coming to the Federal Courts in the United States from Porto Rico, is presented by this petition. The question is raised whether, when a purely Appellate Court like the Supreme Court of Porto Rico reverses a judgment of the Court below which made findings of fact, without making any new findings of its own, the United States Circuit Court of Appeals is precluded from reviewing the action of the Appellate Court—the Supreme Court of Porto Rico, because the Supreme Court of Porto Rico was not asked to make specific findings and specific exceptions were not taken to the statements of fact contained in the opinion of that Appellate Court.

VIII. In the present case, a bill of exceptions was taken by the respondent in appealing to the Supreme Court of Porto Rico; the decision being in the petitioner's favor no bill of exceptions was, of course, taken by it. Petitioner, however, after the reversal by the Supreme Court of Porto Rico, did make detailed assignments of error which counsel for petitioner claimed, and now claims, were adequate to raise before the United States Circuit Court of Appeals the questions as to the propriety of the rulings on fact and law of the Supreme Court of Porto Rico.

IX. The Circuit Court of Appeals, First Circuit, has by this ruling introduced a novel requirement and a novel technicality as an absolute pre-requisite to a review of the action of an Appellate Court. In reviewing the action of

the Supreme Court of a territory or of the Supreme Court of a state, it has never been deemed necessary that bills of exceptions be made out in order to review the action of the Appellate Court, although, of course, bills of exceptions are necessary where the rulings of a Trial Court are sought to be reviewed.

X. It is important for the Bar having cases from Porto Rico to know whether the practice upon appeals or writs of error from the Supreme Court of Porto Rico are to be differently treated than appeals or writs of error from the appellate tribunals of states or territories. If the practice enunciated by the Circuit Court of Appeals in this case shall govern, the Supreme Court of Porto Rico will be obliged to be more than an Appellate Court, and after rendering its decisions on appeal, be required to have extended hearings as to specific findings and bills of exceptions will be required to be made up as to its holdings upon appeal. The whole purpose of an exception respecting a ruling upon evidence or question of fact is to permit the Court to change its ruling to avoid a possible mistake. No such considerations apply to any Appellate Court. The question raised by this application is not merely of importance in this case, but of broad general interest and forms a precedent in a situation never before presented, so far as the petitioner is informed, on appeals from the Supreme Court of Porto Rico. It is earnestly urged that this Court should issue a writ of certiorari to review the decision of the United States Circuit Court of Appeals, First Circuit, and reverse its action and give judgment to the petitioner, or in the alternative to order the United States Circuit Court of Appeals to consider the case upon the merits in all its aspects.

WHEREFORE your petitioner prays that this Honorable Court shall cause a writ of certiorari to be issued pursuant to the power vested in this Court by the Judicial Code of

the United States requiring said United States Circuit Court of Appeals for the First Circuit to certify the whole record and cause to this Court for its consideration, and thereupon that this Court will decide the matter in controversy in favor of the petitioner herein or in the alternative that this Court shall send back said cause and record to the United States Circuit Court of Appeals, First Circuit, with a direction that all matters presented by the record herein be considered upon the merits, and that the petitioner may have such further and other relief as may be just and proper, and your petitioner will ever pray.

ANA MARIA SUGAR CO., INC.,
By CURTIS, MALLET-PREVOST & COLT,
Attorneys.

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, } ss. :

HUGO KOHLMANN, being duly sworn, deposes and says: That he is a member of the firm of Curtis, Mallet-Prevost & Colt, the attorneys for the petitioner Ana Maria Sugar Co., Inc., and that he has read the foregoing petition and that the same is true to his knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

Deponent further says that the reason why this verification is not made by an officer of the petitioner is that the same is a corporation of Porto Rico and that it is impossible, within the three months' period allowed within which to file a petition for a writ of certiorari, to have an officer of the same verify this petition.

That this petition is prepared upon a cable request of the petitioner but recently received.

This petition is made in good faith and not for the purpose of delay.

HUGO KOHLMANN.

Sworn to before me this 5th day of September, 1918.

HURLBERT McANDREW,
Notary Public, Westchester Co.
N. Y. County Clerk's No. 78.
N. Y. Register's No. 10065.

Commission expires March 30, 1920.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and is entitled to the favorable consideration of the Court.

E. CROSBY KINDLEBERGER.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1918.
No. 653.

ANA MARIA SUGAR CO., INC.,
Petitioner,

against

TOMAS QUINONES,
Respondent.

BRIEF FOR PETITIONER.

The petitioner feels that great injustice has been done to it by the affirmance at the Circuit Court of Appeals, First Circuit, upon technical grounds of appellate procedure of the reversal by the Supreme Court of Porto Rico of the judgment dismissing the complaint of the plaintiff, Quinones, made upon careful findings by the District Judge of Mayaguez (Rec., pp. 14-17).

The Facts.

The action was brought by Quinones for alleged breach of contract and the refusal of the petitioner, Ana Maria Sugar Co., Inc., to deliver 740 sacks of centrifugal sugar, second class, at the agreed price of $3.22½ per hundred pounds, the complaint alleging that the contract provided that the price was to be paid in cash at the time of delivery and that the sugar could be delivered to the plaintiff, Quinones, in lots or partial cargoes by 15th of August, 1914, the end of the week subsequent to the date of the contract (Rec., p. 2). The complaint alleged that the defendant, Sugar Company, departing from the agreement required that plaintiff deposit the cost price of the sugar,

$6,079, with the Royal Bank of Canada at Mayaguez, Porto Rico, before delivery, that plaintiff refused to make such deposit, and the defendant company then notified the plaintiff it would make no deliveries, and that the contract was cancelled (Rec., p. 2). The complaint then alleged that on August 10, 1914, the plaintiff did offer to deposit the $6,079, the price of the sugar, at the bank and that the defendant then refused to accept it or to make delivery of the sugar (Rec., pp. 2, 3), and that by this failure to receive the sugar the plaintiff suffered damages in the amount of $6,173.24, the amount of the difference in the price of the sugar due to the rise that occurred in the market in the week between the 10th and 15th of August, 1914 (Rec., p. 3).

Upon the trial and at the Supreme Court of Porto Rico, the questions litigated were: (1) What was the real contract; and, (2), if it was as stated by the plaintiff, what was the proper measure of damages.

It was proven at the trial, beyond contradiction, that long prior to the making of the contract the petitioner, Ana Maria Sugar Co., Inc., had pledged with the Royal Bank of Canada all of its sugar. The fourth finding of the lower court, which was not questioned in the opinion of the Supreme Court, upon this point read as follows:

> "IV. That the said sugar was, upon the execution of the contract, pledged by the defendant to the aforesaid Bank by reason of a private document signed before a notary under date prior to the execution of said contract of sale, and that defendant could not dispose of said article without previously paying its value or amount to the Bank" (Rec., p. 14).

The contract was made on August 4, 1914, over the telephone, and attempted to be confirmed by each side by letter that afternoon. These letters crossed each other, and each set forth a different version of what had been said. The plaintiff testified that nothing was said over the tele-

phone as to the necessity of paying in the money at the bank to redeem the pledge of the sugar, and that therefore he understood the contract to be the usual one of cash upon delivery. On cross examination, however, he said:

> "I asked Mr. Valdes"—I had forgotten this detail—"Is the sugar yours or of the Bank?" and he answered, "The sugar is mine" (Rec., pp. 41-42).

This testimony fully corroborates that of the president of the petitioner, Mr. Valdes, who testified that he told the plaintiff, Quinones, that the sugar was pledged to the bank. If he had not made this statement, it is inconceivable that the plaintiff should have mentioned the bank or have made the inquiry whether the sugar was owned by the bank or by the sugar company.

The lower court found on this convincing testimony and after seeing the witnesses that the real contract was that the money should be previously deposited by plaintiff at the Royal Bank of Canada and at the disposal of the defendant so that the defendant could make the delivery of the sugar sold (Finding No. II; Rec., p. 14). The Trial Court then found, as conclusion of law, that the plaintiff deliberately violated and repudiated the contract in refusing to comply with the provisions of the contract in depositing the money at the bank (Rec., p. 16).

The Supreme Court of Porto Rico not only reversed the judgment of the lower court dismissing the complaint, but ordered judgment for the plaintiff for the full amount of the claim, $6,173.24, with interest (Rec., p. 124), making no findings whatsoever, but merely stating in the opinion that it was unable to agree with the findings of the District Court (Rec., p. 118). Because the price of sugar had rapidly risen in August, 1914, due to the outbreak of the great war, the Supreme Court of Porto Rico considered that the petitioner was attempting to withdraw from an unprofitable contract. It ignored entirely the breach by the plaintiff of the necessary condition, that the money be

immediately deposited with the Royal Bank of Canada to withdraw the sugar from the pledge at that bank, a circumstance recognized by the plaintiff himself on August 10, 1914, when he finally did offer to deposit the money at the bank; this, however, being done several days after he was notified that the contract had been canceled for breach of this necessary condition.

At the United States Circuit Court of Appeals for the First Circuit, it was substantially held that the court was precluded from examining the merits of the case because there were no exceptions taken in the Supreme Court of Porto Rico and no requests for rulings made of that Appellate Court by the petitioner. Judge BINGHAM, writing for the Circuit Court of Appeals, after referring to the statutes and certain cases, which hold that on appeal from a lower court to an Appellate Court upon a writ of error a proper bill of exceptions must be taken, said:

> "In this case, no requests for rulings of law were submitted by appellant (Plaintiff-in-Error) to the Supreme Court of Porto Rico and no exceptions were taken to the rulings made. This being so, no exceptions were preserved by it which could have been embodied in a bill of exceptions and, as a consequence, no bill of exceptions was filed and made a part of the record. Such being the case, the only questions presented for our consideration and assigned as error are, whether the plaintiff's complaint states a good cause of action, whether the Supreme Court exceeded its jurisdiction in making findings of fact, entering judgment thereon, and whether the facts so found support the judgment which it rendered." (Opinion, p. 8.)

Then deciding all these very limited questions in favor of the plaintiff, it ordered the judgment affirmed.

In respect to the damages, the Supreme Court of Porto Rico, ignoring the fact that the contract concededly provided for a delivery by the Sugar Company in ox-carts from day to day at the convenience of the petitioner during the

week ending August 15, 1914, allowed the plaintiff, who had not paid one dollar and who was not shown to have made any contracts of re-sale, or to have been other than a mere speculator of sugar, to recover the difference between $3.22½ and the highest market price obtainable during the entire week ending August 15, 1914, the price of August 15th, which amounted to $6,173.24, or more than the entire original contract price of the sugar, which was $6.079.

Petitioner now feels that so far, through the technicalities of Appellate procedure, it has been deprived of justice, and although it respectfully urges upon this Court that the proper technical practice has been followed, and that the Circuit Court of Appeals should have considered the case upon the merits and not limited its review, as it did. Even if there has been some slight mistake in procedure, it is urged that (to paraphrase the gist of the recent decision in *Friedericksen* v. *Renard,* decided May 20, 1918), the substance of this case should not be subordinated to form of procedure, and accordingly that the questions presented should be squarely passed upon either by this Court or by the Circuit Court of Appeals, as was directed to be done by this Court in the case of *Brown* v. *Fletcher,* 237 U. S., 553.

The State of the Record.

After the findings made by the District Judge of Mayaguez in favor of the petitioner, Ana Maria Sugar Co., Inc. (Rec., pp. 14-16), a bill of exceptions was taken by the plaintiff before appealing to the Supreme Court of Porto Rico. This is contained in the record at pages 100-105. Preceding this was a statement of the case containing all of the evidence, both testimony and exhibits (Rec., pp. 19-99). No bill of exceptions was taken by the defendant Sugar Co., the present petitioner, as the ruling of the lower court was entirely in its favor, the complaint being wholly dismissed. The Supreme Court of Porto Rico did not reverse a single finding of fact or a conclusion of law of the District Judge, making no new findings of its own, merely

stating in the opinion that it did not agree with some of the findings of the District Judge. The Circuit Court of Appeals, ignoring the rule that an appellate court cannot usually be deemed to make findings by expressions in its opinion (*Chapman* v. *Bowen*, 207 U. S., 89-91), and evidently following an expression of this court in *Rosalsky* v. *Graham*, 227 U. S., 584 at 590-591, treated the expressions in the opinion of the Supreme Court of Porto Rico as if they were formal findings, and then went further and held that the petitioner, before presenting the case to the Circuit Court of Appeals, should have asked the Supreme Court of Porto Rico to make specific rulings and taken a bill of exceptions to the statements in the opinion, which it had loosely considered findings, before the merits of the case could be reviewed.

There were presented to the Circuit Court of Appeals assignments of error which fully present the questions now sought to be reviewed by the petitioner and which go to the two vital elements of the case (See Assignments No. III, IV, V, VI and IX as to what contract was made, and Assignments X-XIII as to the measure of damages; Rec., pp. 126-127).

The record does not contain any "Statement of Facts in the form of a special verdict," as was customary on appeals from Porto Rico prior to the repeal of the Act of April 7, 1874, Chap. 80, Sec. 2. It did not contain any exceptions as to expressions or statements in the opinion of the Appellate Court, the Supreme Court of Porto Rico, as such were and are deemed wholly unnecessary.

The Former Statutes Regulating Appeals From Porto Rico No Longer Apply.

It was formerly the rule that writs of error and appeals from Porto Rico came directly to the Supreme Court of the United States under Section 35 of the Foraker Act (Act of April 12, 1900, Chap. 191). This statute pro-

vided that writs of error and appeals from the final decisions of the Supreme Court of Porto Rico could be taken to the United States Supreme Court "in the same manner and under the same regulations and in the same cases as from the Supreme Court of the territories of the United States." Writs of error and appeals from the Supreme Courts of the territories had long been regulated by Act of April 7, 1874, Chap. 80, Sec. 2, by which it was provided:

> "That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, also the rulings of a court on the admission or rejection of evidence, when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together with a transcript of the proceedings and judgment or decree."

This Court held, in *Porto Rico* v. *Emanuel,* 235 U. S., 251 at p. 255, however, that this system, as far as appeals from Porto Rico was concerned, was superseded by Section 244 of the Judicial Code of March 3, 1911. The same ruling was made by this court in *Elzabura* v. *Chaves* (239 U. S., 283), which stated that Section 244 of the Judicial Code of the United States was in turn repealed by Section 3 of the Act of Congress of January 28, 1915, Chap. 22. This court, in *Falco* v. *Mulet* (241 U. S., 615), as appears by the record, again made the same ruling, as it dismissed an appeal taken in 1914, where the Supreme Court of Porto Rico had made "a statement of facts in the form of a special verdict," and it was argued by the appellee, citing *Elzabura* v. *Chaves*, 239 U. S., 283, that this procedure, based on the Act of 1874, was no longer applicable. The action of this court in dismissing the appeal clearly accepted this argument.

The act of January 28, 1915, Chapter 22, amended Section 246 of the Judicial Code as follows:

> " 'Sec. 246. Writs of error and appeals from the final judgments and decrees of the Supreme Court

of the Territory of Hawaii and of the Supreme Court of Porto Rico may be taken and prosecuted to the Supreme Court of the United States within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and in all other cases, civil or criminal, in the Supreme Court of the Territory of Hawaii or the Supreme Court of Porto Rico, it shall be competent for the Supreme Court of the United States to require by certiorari, upon the petition of any party thereto, that the case be certified to it, after final judgment or decree, for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such case unless the petition therefor is presented to the Supreme Court of the United States within six months from the date of such judgment or decree.' Writs of error and appeals from the final judgments and decrees of the supreme courts of the Territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of $5,000, may be taken and prosecuted in the circuit courts of appeals."

On September 6, 1916, a further Act of Congress (Chap. 448) was passed, which amended various sections of the Judicial Code, and required petitions for certiorari writs of error or appeals to be taken within three months of the date of the rendition of the judgment or decree complained of. Section 4 of the Act read:

"That no court having power to review a judgment or decree, rendered or passed by another, shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued on.

> But when such mistake or error occurs, it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

There is now no statute which requires any "statement of the case in the nature of a special verdict," which often took the place of any reference to the testimony in the court below; but appeals from the Supreme Court of Porto Rico are like those from any other Appellate Court which this court may lawfully consider and the same practice should be applicable.

It has never been deemed necessary on an appeal from the Circuit Court of Appeals reviewing a lower Federal Court, District or Circuit, that there should be any bill of exceptions as to the rulings of the Appellate Federal Court—the Circuit Court of Appeals. So long as the plaintiff-in-error comes to this court with assignments of error, the record as considered by the Circuit Court of Appeals is reviewed by this court, which puts itself in the place of the Circuit Court of Appeals and determines whether or not that court was correct in making its decision upon the law and upon the other questions presented to that court. In cases of reversal from the Supreme Court of a territory it was customary to take this attitude. In *Shawnee Compress Co.* v. *Anderson* (209 U. S., 423), where the Supreme Court of the Territory of Oklahoma had reversed the lower court, this court said:

> "In passing on the second proposition the Supreme Court decided adversely to the view taken by the trial court. The court, therefore, must either have considered that there was not some evidence supporting the conclusions of fact of the trial court or must have deemed the principles of law which the trial court upheld were not sustained by its conclusion of fact. As our review, in the nature of things, is confined to determining whether the court below erred, it follows that our reviewing power

> under the circumstances is coincident with the authority to review possessed by the court below, and therefore we are confined, as was the court below, to determining whether there was some evidence supporting the findings and whether the facts found were adequate to sustain the legal conclusions. *Southern Pine Lumber Co.* v. *Ward*, 208 U. S., 126."

In Corpus Juris, article on appeal and error (Vol. 3, p. 951, Sec. 839), it is stated:

> Sec. 839. k. REVIEW OF DECISIONS OF INTERMEDIATE COURTS. Proper exceptions are generally necessary, as in other cases, on appeals or writs of error from or to intermediate appellate courts, where there has been a trial *de novo*. It is otherwise where the intermediate court merely reviews the record brought up from the inferior court, since, if the intermediate court has erred in its judgment, the error will appear by *the record of that court without any bill of exceptions*. But the reviewing court will not, on appeal from the intermediate court, review rulings in the original court to which no exceptions were saved in that court.

Counsel has examined the record in this court of the recent case of *Thomsen* v. *Cayser*, 243 U. S., 66. In that case the plaintiff won in the lower court, which was the Circuit Court of the United States, and the defendant took a writ of error with a bill of exceptions containing the evidence and also his assignments of error. The Circuit Court of Appeals reversed the judgment and at first ordered a new trial, but subsequently, on consnt of the attorneys for the plaintiff, modified its judgment by dismissing the complaint so as to make the judgment final. The plaintiff then took out a writ of error to the United States Supreme Court and filed his assignments of error, but the record does not disclose that any additional bill of exceptions was filed. This court then considered the action of the Circuit Court of Appeals, held it to be wrong, reversed the judgment and reinstated that of the Circuit Court.

Counsel has not examined any record which has come to this court from the Supreme Court of Porto Rico since the taking effect of the Act of January 28, 1915, Chapter 22, and most of the records seen were made up before the taking effect of Section 244 of the Judicial Code, so that they all contain this "Statement of facts in the nature of a special verdict" signed by the Judges of the Supreme Court of Porto Rico, which is now made obsolete by the new statutory enactments. The fact that no such "statement of facts" was made by the Supreme Court of Porto Rico should work to the credit of the petitioner and not the respondent, as such a statement by the Supreme Court of Porto Rico might have had effect as findings of fact by that court and had much more effect as findings than can the mere statements contained in the opinion of the Supreme Court of Porto Rico in this case.

In New York, where exceptions taken at the trial are very essential to present questions of law to the Appellate Courts, it has always been the practice that exceptions are only required at the trial court and are not needed as to the action by the Appellate Court. In New York since the amendment of Section 1317 of the Code of Civil Procedure which allows appellate courts of the State now upon reversal to give final judgment and to make findings in support of such final judgment, thus shortening litigation and avoiding unnecessary new trials, it has been distinctly held that to such new findings by the Appellate Court no exceptions are necessary.

Andrews v. *Cohen*, 221 N. Y., 148.

In that case ANDREWS, *J.*, said at pages 152-153:

> "Where the Appellate Division reverses or modifies a judgment of the Trial Term and orders a judgment proceeding on a different theory of the facts, it must make such additional findings as are necessary to support the judgment which it has ordered.

> *No exception need be taken to the findings. They are to be reviewed by us.* If there is evidence to sustain them we cannot interfere provided they justify the judgment which the Appellate Division directs."

In Porto Rico the statutes early recognized the modern demand, both of lawyers and laymen, that long drawn out litigation and appeals be shortened as much as possible so that in Porto Rico it was provided, by Act of March 12, 1903:

> "Sec. 1. That the Supreme Court of Porto Rico shall hereafter be *a court of appeals* and not a court of cassation. In s deliberations and decisions, in all cases, civil or criminal, said court shall not be confined to the errors in proceeding (Procedure) or of law only, as they are pointed out, alleged or saved by the respective parties to the suit, or as set fourth (forth) in their briefs and exceptions, but in furtherance of justice, the court may also take cognizance of all the facts and proceedings in the case as they appear in the record, and likewise consider the merits thereof, so as to promote justice and right to prevent injustice and delay." Compilation of Revised Statutes and Codes of Porto Rico, p. 241, s. 1141.

In 1906 a further act was passed, which read:

> "(5350) Sec. 306 *(as amended by Act of March 3, 1906, page 614).* When the judgment, order or decree of the court below shall be reversed, the court shall proceed to render such judgment, order or decree as the court below should have rendered, except when it is necessary that some matters of facts be ascertained, or the damage to be assessed or the matter to be decreed is uncertain in any of which cases the cause shall be remanded for a new trial in the court below."

In New York the modern extension of the power of the Appellate Court to disregard technical errors which had

existed under Section 542 of the Code of Criminal Procedure for some years, was extended to civil cases in 1912 by the amendment of Section 1317 of the Code of Civil Procedure. That section now provides, that the Appellate Division of the Supreme Court should render judgment of affirmance, reversal and final judgment

> "upon the right of any or all of the parties, or judgment of modification thereon according to law, except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing * * *. After hearing the appeal, the court must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties."

The Federal Act of September 6, 1916, Chap. 448, Sec. 4, which provides for disregarding a mistake in applying for an appeal when a writ of error is proper, or vice versa, is in line with this modern theory so well applied by this court on May 20, 1918, in the recent case of *Fridericksen* v. *Renard* (247 U. S.), that substance should never be subordinated to forms of procedure.

The whole theory of an exception was well expressed by Mr. Justice PITNEY of this court in *U. S.* v. *U. S. Fidelity Co.* (236 U. S., 512), when he said:

> "The primary and essential function of an exception is to direct the mind of the trial Judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrial due to inadvertent errors may thus be obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court. (*Black* v. *Taylor*, 93 U. S., 46, 55; *Robinson & Co.* v. *Belt*, 187 U. S., 41, 50; *Addis* v. *Rushmore*, 74 N. J. L., 649, 651; *Holt* v. *United Security Life Ins. Co.*, 76 N. J. L., 585, 593.)

The various authorities cited by the Circuit Court of Appeals in its opinion are all cases where it was held that exceptions must be taken in the trial court to properly present questions upon appeal, and that a bill of exceptions to the rulings of the trial court was necessary. In none of them was it held that where final judgment was given upon reversal against the successful party in the court below it was necessary to take out a *new bill of exceptions* or to ask the Appellate Court for rulings when making the new judgment upon reversal, nor that unless specific exceptions were taken to these rulings of the Appellate Court all further right to review, even in the case of an admitted injustice, was forever barred.

The Circuit Court of Appeals in this case, by denying a right to review upon the merits in a case where great injustice was done by the Supreme Court of Porto Rico, upon the ground that an improper appellate procedure was followed, has blazed a new trail of technicality where, to say the least, no set practice has existed. The old requirement of "Statement of facts in the nature of a special verdict" having become obsolete by the repeal of the Act of 1874, the statute did not prescribe any different procedure on writs of error from Porto Rico than from any other state or federal courts.

In adopting the practice which would be applicable throughout the United States on appealing from one Appellate Court to another, it is submitted that the petitioner was correct in its procedure, and that no so-called bill of exceptions was required to review the action of the Supreme Court of Porto Rico made by statute a purely Appellate Court.

The assignments of error should have been deemed sufficient to raise the points about which the petitioner now complains that injustice was done to it: (a) that the terms of the contract were as found by the lower court and not as stated in the opinion of the Supreme

Court, and (b) that in any event the measure of damages was improperly declared by the Supreme Court of Porto Rico.

This court in the early case of *Herbert* v. *Butler* (97 U. S., 319), decided that merely because a bill of exceptions was not properly named, this court would not be precluded from examining the case upon the merits when there was enough to present the case to its consideration. The same rule should be applied here to remedy the great injustice of having this case decided against the petitioner on a technical point of appellate procedure which has so far prevented justice from being done.

By reason of the novelty of the question as to Appellate procedure presented, and on account of the grave injustice which has so far been done to the petitioner, it is respectfully submitted that the petition for the writ of certiorari be granted, and that thereupon this Court either itself take up the questions upon the merits, as it may do under the provisions of Section 240 of the Judicial Code; or that, following the procedure in Brown v. Fletcher (237 U. S., 553), it send the case back to the Circuit Court of Appeals with direction to consider upon the merits the questions presented by the assignments of error.

Respectfully submitted,

E. CROSBY KINDLEBERGER,
Of Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. [redacted]54

ANA MARIA SUGAR CO., Inc.,

Petitioner,

against

TOMAS QUINONES,

Respondent.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

CURTIS, MALLET-PREVOST & COLT,
Attorneys for Petitioner,
30 Broad Street,
Borough of Manhattan,
City of New York.

E. CROSBY KINDLEBERGER,
of Counsel.

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Table of Citations

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 202.

ANA MARIA SUGAR CO., INC.,
Petitioner,

against

TOMAS QUINONES,
Respondent.

This Court on October 31, 1918 (248 U. S., 555), granted a writ of certiorari to the Judges of the United States Circuit Court of Appeals for the First Circuit (Rec., p. 113) to which return was duly made on November 20, 1918 (Rec., pp. 113-114).

The action was originally brought by Tomas Quinones as plaintiff against the Ana Maria Sugar Co., Inc., as defendant, in the District Court of Mayaguez, in Porto Rico (Rec., p. 1) and came on for trial before Mr. Justice FOOTE (Rec., p. 14), who sat without a jury. After hearing considerable testimony (Rec., pp. 14-74) he rendered judgment in favor of the defendant, Ana Maria Sugar Co., Inc., the petitioner herein, dismissing the complaint (Rec., pp. 9-10, 13). The learned Trial Judge made fourteen detailed findings of fact (Rec., pp. 10-12) and five conclusions of law (Rec., p. 12). Quinones then took an appeal to the Supreme Court of Porto Rico (Rec., p. 13) which reversed the judgment and rendered a lengthy opinion (Rec., pp 86-93) which referred to certain findings of the District Judge

and stated that it was unable to agree with such findings (Rec., p. 89). The Supreme Court of Porto Rico made no new findings of its own nor did it specifically reverse any of the findings of the District Judge nor state what findings of the District Judge it approved. The Supreme Court of Porto Rico not only reversed the dismissal of the complaint by the District Judge but awarded judgment for the plaintiff Quinones in the full amount claimed $6,173.24 (Rec., p. 93).

Ana Maria Sugar Co., Inc., the defendant in the court below, then made application to appeal to the United States Circuit Court of Appeals, First Circuit (Rec., p. 94) and filed fifteen assignments of error (Rec., pp. 95-96) and gave a bond (Rec., pp. 96-97). In the United States Circuit Court of Appeals the judgment of the Supreme Court of Porto Rico was affirmed (Rec., p. 109), the opinion of the Court being written by Judge BINGHAM (Rec., pp. 103-108). This opinion did not pass upon the merits of the contention of your petitioner, Ana Maria Sugar Co., Inc., nor consider the main questions presented upon the appeal:

> (1) Whether if a contract for the sale of the sugar were made it was not as found by the District Judge that as the sugar had been pledged to the Royal Bank of Canada the sugar was to be delivered only if the plaintiff should deposit with the Royal Bank of Canada its purchase price, and release the lien of the bank.
>
> (2) Whether the minds of the parties ever met in a valid contract.
>
> (3) Whether if the contract was made as alleged by the plaintiff an erroneous measure of damages was not adopted.

The learned Circuit Court of Appeals decided the case purely on a question of practice, holding that the appeal was improper but that it would consider the case as if a

writ of error had been obtained. It was held upon the writ of error that as your petitioner, Ana Maria Sugar Co., Inc., had presented no bill of exceptions, neither questions of fact nor the merits of the case could be reviewed, and the only questions open were whether the complaint stated a cause of action; whether the facts as found by the Supreme Court of Porto Rico supported the judgment rendered (Rec., p. 107) and whether there were any errors appearing on the face of the record proper. Upon this limited review the judgment of the Supreme Court of Porto Rico was affirmed.

In its application for a writ of certiorari to this Court your petitioner urged that all findings of fact in the trial court had been in its favor; that the Supreme Court of Porto Rico in reversing the judgment had made no new findings, and that it was not proper to require a bill of exceptions to be taken to the action of that Appellate Court and that the affirmance by the Circuit Court of Appeals should not prevent the merits of the action from being reviewed by this Court. The decision of this Court in granting the writ of certiorari (218 U. S., 555), evidently has adjudicated that the merits of this case can and should be reviewed.

The assignments of error.

The assignments of error which are urged before this Court by the petitioner are those that were presented to the United States Circuit Court of Appeals but which that Court refused to consider on account of the question of practice already referred to.

Upon the question what was the contract between the parties for the sale of sugar alleged to have taken place at Mayaguez, Porto Rico, on August 4, 1914, if any binding contract existed, the following assignments of error to the action of the Supreme Court of Porto Rico are important:

> "III. That the said Court erred in holding and deciding that the condition that the plaintiff was

to deposit the price or value of the sugar alleged to have been sold, subject to the order and for the account of defendant, as a condition precedent to the delivery of said sugar, was not embodied in the contract made by the parties, nor agreed to by plaintiff.

IV. The said Court erred in holding and deciding that said sugar was to be paid for upon its delivery and not prior thereto.

VI. That said Court further erred in reviewing the evidence in this case and overruling and reversing the finding of facts made by the trial court upon the condition precedent for the payment of said sugar.

VII. That the said Court erred in failing to consider and give due weight to the fact, proved in the record, that upon closing the said alleged contract, the defendant herein, by notice in writing, placed the said sugar at the disposal of plaintiff.

IX. That said Court erred in failing to consider and give weight and effect to the fact, as proved in the record, that plaintiff made no tender of the price of said sugar to the defendant, and that said sugar was pledged to the Royal Bank of Canada.

XIV. That the said Court erred in holding and deciding in effect that the defendant, the Ana Maria Sugar Company, broke its said pretended contract with the plaintiff above named" (Rec., pp. 95-96).

On the question of damages, the following assignments of error are important:

"X. That said Court also erred in holding and deciding that plaintiff herein was entitled to damages by way of compensation.

XI. That said Court erred in holding and deciding that the profits arising out of the rise of the price of the sugar in the New York market was con-

templated by the parties at the time of the making of the said alleged contract.

XII. That the said Court erred in allowing compensation to the plaintiff based upon the difference between the contract price and the price of the said sugar in the New York market at the end of the term alleged to have been contracted for its delivery" (Rec., p. 95).

The importance of these assignments of error will appear more in detail after the consideration of the facts found by the Trial Judge, which have never been specifically reversed by any court, and the testimony upon which they were based, as well as by the argument on the points of law following the consideration of the facts.

The Facts.

Inasmuch as the writ of certiorari here brings up the whole case for examination (*Camp* v. *Gress*, 250 U. S., 308, 318; *Latcher & Moore Lumber Co.* v. *Knight*, 217 U. S., 257, 267; *Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U. S., 580, 588), the facts will be considered under subdivisions.

(a) The Pleadings.

The amended complaint alleged that on August 4, 1914, in the City of Mayaguez, Porto Rico, the plaintiff bought from the defendant 740 sacks of centrifugal sugar, second class, at the rate of $3.22½ per hundred weight, "according to the custom of this market, cash value at the moment of delivery," and that this sugar should be delivered to the plaintiff in lots or partial cargoes by the end of the week subsequent to the date of the contract, to wit, the 15th day of August, 1914 (Rec., p. 2). It was then

alleged that the defendant, departing from the agreement by letter received by the plaintiff on August 5, 1914, required that he should make previous deposit of the total amount of the invoice for the sugar sold ($6,979), and that this the plaintiff refused to accept, whereupon on August 6, 1914, the defendant corporation informed the plaintiff that the contract had been cancelled and did not make any deliveries of sugar, although the plaintiff was willing to pay the price agreed, and complied, on his part, with all the stipulations of the contract (Rec., p. 2). It was then alleged that on August 10, 1914, the plaintiff in good faith offered to make a deposit of the $6,979, the price of the sugar, and that the defendant refused to make delivery of the sugar sold (Rec., p. 2).

A far different transaction was set up in the amended answer which alleged:

> "I. That on or about August 4, 1914, in the city of Mayaguez, Porto Rico, plaintiff and defendant entered into or had certain negotiations as to a sale by the latter to the former of 748 sacks of cane sugar, which was to be carried out in the following terms: Plaintiff was to make a previous deposit on that very day in the Royal Bank of Canada, at Mayaguez, Porto Rico, and in favor of the defendant, of the amount of the purchase price of said sugar, to wit, the sum of $6,979, and once the deposit was made the defendant was to deliver the said sugar to the plaintiff in partial lots of 160 sacks, the first by railroad, upon receipt of the order of the Bank to that effect, and the remainder by cart loads during the week next to the aforesaid date.
>
> II. That the stipulation as to the previous deposit of the value for said sugar in the said Bank had to be, and was, a condition previous and precedent to the obligation of making the delivery of the sugar by the defendant to the plaintiff, which was imposed and accepted by the defendant, inasmuch as the said sugar was subject to a contract of loan of the same with said Royal Bank of Canada,

in Mayaguez, according to which contract the defendant could not dispose, in any manner, of said sugar without first making a deposit of the value thereof, and obtaining the proper authorization by said Bank, all of which was known to plaintiff at the time of the said negotiations" (Rec., pp. 6, 7).

(b) The Pledge of the Sugar.

The District Judge found:

> "IV. That the said sugar was, upon the execution of the contract, pledged by the defendant to the aforesaid Bank by virtue of a private document, signed before a notary, under date prior to the execution of said contract of sale, and that defendant could not dispose of said article without previously paying its value or amount to the Bank" (Rec., p. 11).

This finding was not referred to in the opinion of the Supreme Court of Porto Rico and was not reversed and was amply supported by the testimony.

The agreement of pledge was introduced in evidence as Defendant's Exhibit 1 (Rec., p. 49), but this being inaccurate as to date and in other respects the corrected exhibit was later inserted in the record by consent and called Exhibit 1a (Rec., pp. 84, 85). From these exhibits it appeared that the defendant Sugar Company had obtained on May 23, 1914, a loan of $5,800 from the Bank, and had pledged 968 bags of sugar, 720 bags being at the Central Ana Maria, and 248 at Pagan's Warehouse (Rec., pp. 48, 85).

Mr. Hiltz, the Manager of the Bank (Rec., p. 62) and who was clearly an impartial witness and who testified that both the plaintiff and defendant company were his clients (Rec., pp. 51, 53), said that the pledge agreement covered the sugar involved in this suit (Rec., pp. 48, 50). He said:

> "This sugar was pledged to the Bank by Ana Maria Sugar Company, as shown by document mark-

ed 'Defendant's Exhibit 1'; Ana Maria Company could dispose of it after depositing the amount of the loan secured by such sugar."

"In this way we have always dealt with Ana Maria Sugar Company, so that, in accordance with the contract, if they want to sell or dispose of a part of the sugar pledged, a deposit was made in the Bank covering the proportional part which was to be disposed of, and the Bank then issue the order for delivery" (Rec., p. 50).

He further said that the Bank did not lend any money to the Ana Maria Sugar Company from the first to the tenth of August, 1914, and on that date the defendant had no sugar, as it was all pledged to the Bank (Rec., p. 53).

The testimony of Mr. Hiltz corroborates that of Mr. Alfonso Valdes, the President of the defendant (Rec., p. 59), that all the defendant's sugar was pledged (Rec., pp. 59, 64). Mr. Vals, the Treasurer of the defendant, also testified that on the 4th of August, 1914, all the sugar had been pledged to the Bank and that there was not any unpledged sugar (Rec., p. 66). Mr. Valdes said that in cases of pledged sugar the money was always deposited in the bank before the delivery of the sugar, and that this deposit was made on the same day or the following day (Rec., p. 64).

There was no testimony that the sugar was not pledged and the finding of the District Court (IV, Rec., p. 11) not referred to or reversed by the Supreme Court of Porto Rico, is therefore conclusive.

(c) Happenings of August 4, 1914.

Mr. Valdes testified that on August 4, 1914, in a telephone conversation with plaintiff, after discussion of price of sugar to be sold to the plaintiff and reaching an agreement of $3.22½ per hundred pounds, he told the plaintiff that 160 sacks had already been loaded on the wagon of

the American Railroad (Rec., p. 54), and the rest was in the warehouse of the defendant (Rec., p. 54). He further testified:

> "I told Mr. Quinones that as soon as I should receive the order from the Bank, from the Royal Bank of Canada, in regard to the delivery of the sugar, I would immediately send the wagon containing the 160 sacks, and I would start on the next week sending him the other sacks (those that were not on the wagons), in mule carts, in carts which we have at the Central, but that it was a necessary and indispensable requisite to deposit in the Royal Bank of Canada the sum, the amount—that is, the amount of the bill—the price of the sugar, to which Mr. Tomas Quinones agreed immediately" (Rec., p. 54).

The office of the Central was about eight or nine kilometers from Mayaguez (Rec., p. 56), but this would not be too great a distance for carting, which would save railroad freight, as the defendant owned the carts (Rec., p. 58). The proposal to deliver in this way was made by Mr. Valdes so as not to overwork his oxen (Rec., p. 58); but this was a convenience also to the plaintiff, who would not need so many workmen at the playa when the sugar came in (Rec., p. 58).

Mr. Valdes was positive that he told the plaintiff that the sugar was pledged, and that it was necessary for the plaintiff to deposit the money in the Bank in order to obtain the order of delivery (Rec., p. 59).

Mr. Vals, the Treasurer of the defendant, fully corroborated Mr. Valdes, as he was sitting near the telephone at the time of the conversation, and heard Mr. Valdes say that the person to whom he was talking should deposit the price of the sugar in the Royal Bank of Canada (Rec., p. 66).

In considering the testimony of the plaintiff, it is important to remember that Mr. Valdes said that the plain-

tiff on being told that the money had to be paid to the Bank merely said "All right," or words to that effect (Rec., p. 59).

Acordingly, the testimony of plaintiff's assistant, Mr. Monefeldt, that he heard the plaintiff speaking over the telephone, and that he heard talk of the price of the sugar and the date of delivery, but nothing about paying for it in advance (Rec., p. 72), but that he could not hear what was said at the defendant's end of the line (Rec., p. 73), is perfectly consistent with the testimony of the defendant, so that the testimony of the plaintiff that nothing was said as to the sugar being pledged (Rec., p. 29) is wholly unsupported.

On cross-examination the plaintiff made two very important admissions which strongly corroborated the testimony of the defendant, saying:

> "I asked Mr. Valdes—I had forgotten this detail—'Is the sugar yours or of the Bank?' and he answered: 'The sugar is mine'" (Rec., p. 31; see also p. 32).

As the sugar was pledged, Mr. Valdes, as matter of course, would mention the fact. If he did not say this, it is improbable that the plaintiff should have talked about the Bank at all or have inquired whether the Bank had the sugar.

It appears that immediately after the telephone conversation that afternoon, both plaintiff and Mr. Valdes wrote letters of alleged confirmation of the transaction. Mr. Vals, the Treasurer of the Bank, who had heard the conversation of Mr. Valdes, wrote out the letter at Mr. Valdes' request, and having heard the condition as to the Bank, put it in the letter (Plaintiff's Exhibit C, p. 19), which he prepared (Rec., p. 66), and which Mr. Valdes stated was dictated to Mr. Vals immediately after the telephone talk (Rec., p. 56). This letter reads as follows:

"(C) Mayaguez, August 4th, 1914.

Mr. Thomas Quinones, Mayaguez.

Dear Sir and friend:

We hereby ratify the sale we have made you of 748 sacks of sugar, second kind, weighing 252 pounds each sack, at price of $3.22.5 per 100 weight, which sugar is at your disposal at this Central, to be delivered to you during next week, and a wagon, with 160 sacks, which shall be dispatched as soon as we get the order from the Royal Bank of Canada, of this city. We also beg to enclose the corresponding invoice for the 748 sacks, which are valued at $6,079, which sum must be deposited by you at The Royal Bank of Canada, aforesaid, to our account, to be able to make the delivery as agreed.

Yours truly,
(Signed) Ana Maria Sugar Co., Inc.,
A. Valdes, President" (Rec. p. 19).

The invoice (Exhibit D) which accompanied the letter showed that the total price was $6,079, number of sacks 748, total weight 188,496 pounds, and the price $3.22½ per 100 weight (Rec. p. 19).

It is significant that the plaintiff on August 5, 1914, the next day, admitted that the invoice was correct and that the defendant's letter was also correct (Rec. pp. 19-20), with the exception of the provision about the deposit with the Royal Bank of Canada (Rec., p. 20). This admission shows that the letter written by the plaintiff through Monefeldt placing the number of sacks at 740 and that the deliveries to be made "during all next week" (Exhibit B, pp. 18-19), was not accurate. Moreover, Exhibit B, the plaintiff's letter of confirmation, said nothing about when or how payment for the sugar should be made, and is not inconsistent with what the defendant said as to prepayment being required by the Royal Bank of Canada in order to release the pledge.

It is undisputed that on the afternoon of the fourth of August, 1914, Mr. Valdes started for San Juan (Rec., pp. 54, 66), where he remained until the 7th of August (Rec., p. 55), as he was accustomed to stay with his family once every two weeks during the grinding season, and once a week at other times (Rec., p. 63).

It is thus seen that the District Judge was fully justified in making the following finding:

> "II. That on or about August 4, 1914, plaintiff and defendant entered into a contract by telephone, by virtue of which the latter sold to the former 748 sacks of centrifugal sugar, second class, each sack weighing 252 pounds, at the price of $3.22½ per hundred weight, the said sugar being immediately placed at the disposal of the plaintiff, at the storehouse of the factory, situated in the ward of Sabanetas, of the Municipality of Mayaguez, to be delivered by the defendant to the plaintiff in the following manner: One hundred and sixty sacks by railroad as soon as defendant received the order for delivery from the Royal Bank of Canada, Mayaguez branch, and the remainder during the week next to that of the date of the execution of this contract, and in cart-loads; it being agreed likewise by both parties that the value of said sugar—that is, the sum of six thousand and seventy-nine dollars ($6,079)—should be previously deposited by plaintiff in said Bank, and at the disposal of the defendant, so that the latter could make the delivery of the sugar so sold" (Rec., pp. 10-11).

This finding was not specifically reversed by the Supreme Court of Porto Rico and was not at all considered by the United States Circuit Court of Appeals (Rec., pp. 103-108).

(d) Failure of the Plaintiff to pay for the sugar at the Bank.

On August 5, 1914, after receiving this letter of confirmation (Exhibit C), the plaintiff replied acknowledg-

ing receipt of that letter and of the bill for the sugar bought and stated:

> "I agree with all, except with the duty which you impose on me of paying for the article before receiving same" (Exhibit E, Rec., p. 20).

On the 5th of August, Mr. Vals, Treasurer of the defendant, went to the Royal Bank and told Mr. Hiltz, the Manager, about the transaction, and that the plaintiff had to deposit the price of the sugar at the Bank (Hiltz, Rec., p. 50). Mr. Vals testified that having been asked by Mr. Valdes before he went to San Juan, on the evening of the 4th, to be on the lookout for the deposit of the money at the Bank, he stopped on the morning of the 5th at the Bank on his way from Mayaguez to the Central (Rec., p. 66), and then told Mr. Hiltz of the arrangement, and asked to be notified if the deposit were made so that he could proceed with the delivery of the sugar (Rec., p. 66).

There is some question in the testimony whether it was on the fifth or the sixth of August that Mr. Hiltz, Manager of the Bank, communicated with the plaintiff as to the necessity for releasing the pledge of the sugar by payment at the Bank; but all the witnesses agree, even the plaintiff, that on one of these days Mr. Hiltz did telephone to the plaintiff and asked the plaintiff to deposit the money.

Mr. Hiltz first said that this telephone conversation was between 1:30 and 2:30 P. M. on the sixth, and that the plaintiff called in at the Bank that afternoon (Rec., p. 50), and that the plaintiff then inquired why he should have to deposit the money in the Bank as that was not the custom among merchants, whereupon Hiltz replied that he could do nothing; that he had orders from Mr. Valdes to that affect, and if the money was not deposited at three o'clock that day he could not give an order for the delivery of the sugar (Rec., p. 50).

On September 10th, Mr. Hiltz wrote the plaintiff a letter (Exhibit T—found improperly translated, Rec., pp. 52, 53, and correctly translated, Rec., p. 83), in which he confirmed the telephone conversation that the plaintiff had had with him on the afternoon of August 5th,

> "in which we advised you, having received from the Ana Maria Sugar Company instructions to receive from you, for their account, if presented on that day, the sum of $6,079 (six thousand and seventy-nine dollars)" (Rec., p. 83).

The plaintiff testified that he had in the Bank during all this time a current account which never went below $25,000, and also a special deposit of $11,000, on which it would be necessary to give two weeks' notice before withdrawing (Rec., p. 74), so that there was apparently no reason why the plaintiff should not have immediately drawn his check on the Bank for the price of the sugar, released it from the pledge, and obtained an order for its delivery.

The record shows that the price of sugar in New York on the 4th and 5th of August was $3.525, on the 5th and 6th averaged $4.14 per 100 weight, the Porto Rican price being twenty cents less (Rec., p. 37), so that the plaintiff by paying but $3.22½ on the 5th of August would have made a material profit on the sugar if he had taken it at that time, and the plaintiff in this transaction was admittedly a speculator (Rec., p. 16).

The plaintiff admitted that he had had an opportunity to make the deposit on August 5th (Rec., p. 31), but claimed that he felt disgusted on receiving the defendant's letter of August 4th, and that that letter did not express the true agreement (Rec., p. 30). He admitted that he went to the Bank and spoke to Mr. Hiltz on the 5th when sugar was up (Rec., p. 31), and claimed that he called up the defendant and tried to speak to Mr. Valdes to see if some mistake had not been made (Rec., p. 31).

He also admits that he spoke to Mr. Vals on the phone. He said:

> "'Tell me, Vals, will you explain me this: I received a letter in this sense, and now the Royal informs me that if I do not give that money now they will not receive it tomorrow.' He says: 'Don Tomas, I do not know anything of that; this is a matter of Mr. Valdes; the only thing I know is that the Bank has informed me not to deliver the sugar'" (Rec., p. 31).

A strong circumstance which wholly discredited the plaintiff was his assertion that he made no inquiries of the Bank about the sugar having been pledged (Rec., p. 31), although he knew from Mr. Hiltz, the manager, and from Exhibit C (Rec., pp. 19, 31), that the money was to be paid in to the Bank, which, of course, must have conveyed to him that the sugar had been pledged at the Bank. Under these circumstances the following finding of the District Judge seems amply supported by the evidence:

> "IX. That plaintiff made no offer to defendant as to the satisfaction of the value of said sugar as agreed in said contract, nor did he offer to make a deposit, nor did he deposit the said value for the sugar while the aforesaid contract was continued in force by the defendant" (Rec., p. 11).

(e) Cancellation of the Contract.

Mr. Vals testified that pursuant to his instruction from Mr. Valdes before he left for San Juan and by telephone from Mr. Valdes on the 6th of August, and after being informed by Mr. Hiltz that the banking day had closed that afternoon, and that plaintiff had not deposited the money either on the 5th or 6th, he wrote, Exhibit F (Rec., p. 20), cancelling the operation (Rec., p. 66). This letter stated:

"(F) Mayaguez, August 6th, 1914.

Mr. Tomas Quinones, Mayaguez.

Dear Sir and Friend: Having been informed from the Royal Bank of Canada, of this city, that you have not delivered for our account the price of the sugar sold to you according to our letter of the 4th instant, without said requirement we cannot make the deliver of said sugar, under the conditions of our letter, we beg to inform you we have cancelled the transaction of sale, and therefore beg to ask you to return to us the invoice remitted covering the purchase. We regret this incident which prevents us from carrying into effect the transaction made between you and our President, and we remain,

Your friends,

(Signed) ANA MARIA SUGAR CO., INC.,

Per VALS, Treasurer" (Rec., p. 20).

Mr. Valdes testified to having telephoned from San Juan and that he also telephoned the Bank that day (Rec., pp. 54, 55, 60, 61). He said that he had waited three days for the plaintiff to deposit the money and he thought his offer should not be open indefinitely (Rec., p. 57).

At that time sugar was $4.14 at New York or $3.94 at Porto Rico,—$.71½ more than the contract price per hundred pounds or $1,337.96 more expensive on the entire amount.

On the 7th of August, 1914, plaintiff wrote a long letter (Exhibit G, Rec., p. 21), in which he claimed delivery was to be in what he termed "the ordinary manner," but that he would be willing to pay for the sugar when delivered, even if it were all delivered at once. The letter carefully refrains from referring to the sugar having been pledged, although the plaintiff then knew that this was the condition (Rec., p. 31). The District Court

found that the defendant rightly rescinded the contract for plaintiff's failure to pay the money to the bank, saying:

> "VIII. That defendant on August 6, 1914, informed the plaintiff, by letter sent to him on said date, that the above contract was terminated and rescinded, which was confirmed by letter of the 7th of the same month, the defendant having taken this resolution, inasmuch as plaintiff did not comply with the condition stipulated with regard to the payment" (Rec., p. 11).

(f) The belated deposit at the Bank.

The strongest admission on the part of the plaintiff that the defendant's letter of August 4th (Exhibit C), expressed the correct agreement between the parties was a belated attempt on August 10, 1914, on the part of the plaintiff to deposit the $6,07$ at the Bank, with a demand for delivery during that week (Exhibit K, Rec., p. 23). August 10, 1914, was Monday, when the average price of sugar was $4.97 at New York (Rec., p. 37), and allowing for the twenty cents difference at Porto Rico (Rec., p. 36), the Porto Rican price was $4.77. This made the difference between the contract price and the market that day, $1.34½ per 100 weight, which, for the 188,196 pounds, aggregated $2,555.27. The contract having been cancelled, the Bank refused to accept the check (Exhibit P, Rec., p. 33), the Bank's letter being admitted in evidence as Exhibit Q (Rec., p. 34).

The District Court found:

> "X. That on August 10 of the said year, 1914, and after plaintiff had notified the defendant of his repudiation of the manner of making the payment, and made a different proposition as to the manner of delivery of the article contracted for, it was that the said plaintiff attempted to deposit in the Royal Bank of Canada, Mayaguez branch, the price of said

sugar in the sum agreed and by means of a check" (Rec., p. 11).

No demand was made by the plaintiff for the sugar after this.

(g) The rise in price and the subsequent sale of the sugar.

Mr. Bravo testified as to the values of sugar in New York, and that during the week beginning Monday, August 10th, the price of sugar in New York constantly rose from $4.92 to $6.52 (Rec., p. 37) on the 14th, which was Friday; and on Monday, the 17th, and Tuesday, the 18th, it was at the same price. Then it gradually dropped, with fluctuations, but still remained at $6.02 on the 31st day of August, 1914. The average for the entire month was $5.477 (Rec., p. 37). The Sugar Sales Corporation quotations were substantially the same, the average for the month at Porto Rico being the same figures less the 20 cents. The average at Porto Rico for the first half of August, 1914, was given at $4.807, and for the second half of August, 1914, at $6.085 (Rec., p. 46).

Mr. Valdes having testified that most of the defendant's company's sugar for 1914 sold at $6.52 (Rec., p. 45), although he had sold sugar to Mr. Grau at $3.35 (Rec., p. 45), the Supreme Court of Porto Rico used that testimony as a basis for holding the defendant responsible for the highest price of the month—$6.52.

(h) The Opinions and Findings of the Lower Courts.

The opinion of District Judge Foote after stating them detailed findings of fact already referred to (Rec., pp. 10, 11) made the following conclusions of law:

> "1. That plaintiff, Tomas Quinones, unduly violated and repudiated the contract he had with the

defendant in refusing to comply with the stipulation made as to the payment in the manner stipulated by his letter of August 5, 1914.

II. That the proposal made in said letter to the defendant that the date of the delivery of the goods should be changed, constituted a proposal to modify the said contract, which was never accepted by the defendant.

III. That the attempted offer as to the deposit of the money made by the plaintiff in the Royal Bank of Canada, on August 10, 1914, after the contract had been violated and repudiated by him, and had been broken and rescinded by the defendant, could not produce, nor did it produce, any legal effect.

IV. That the violation and repudiation of the contract by the plaintiff, in the manner stated, justified the cancellation and rescission made by the defendant.

V. That by virtue of the foregoing facts and conclusions, plaintiff is estopped from claiming or recovering anything from the defendant, and the complaint filed by the plaintiff should be dismissed, as it is hereby dismissed" (Rec., p. 12).

In the Supreme Court of Porto Rico, while Justice HUTCHISON said that the Court found itself "wholly unable to agree with the trial court in its findings as to the nature of the original contract" (Rec., p. 89), no new findings were made. The following expressions in the opinion are the only ones that could by any possibility be construed as being equivalent to findings.

"It will suffice to say that we are thoroughly convinced by the whole record that in the conversation by telephone, on the 4th of August, which constituted the true contract between the parties, nothing whatever was said about a deposit of money as a condition precedent to the delivery of the sugar.

> The conduct of plaintiff from the beginning to the end of the controversy is entirely consistent with his version of that conversation, is inexplicable upon any other theory, and is wholly inconsistent and irreconcilable with the version of defendant and the theory of the Trial Court. * * *
>
> * * * It may be that the representative of defendant intended to include the stipulation in the original agreement and believed that he had done so. It may be that he had no desire to avoid or repudiate his contract and that he acted in the utmost good faith throughout. But however this may be, we have no doubt whatsoever that the first notice plaintiff ever had of the proposed requirement as to deposit of the purchase price was contained in defendant's letter confirming the agreement by telephone and after the contract of purchase and sale had been consummated" (Rec., pp. 89, 90).

The opinion of the Supreme Court ignored the finding that the sugar was pledged; the finding of the District Court supported by the testimony of two witnesses that the plaintiff was told the sugar was pledged, and finally the admission of the plaintiff upon cross examination that he had asked Mr. Valdes, President of the Ana Maria Sugar Co., Inc., whether the sugar was owned by the defendant or the Bank. This question would have been wholly unnecessary unless some talk had preceded that as to the rights of the Bank. If nothing had been said about a pledge it never would have occurred to the plaintiff to mention the Bank at all. There was no motive for the defendant on August 4, 1914, when writing the letter of confirmation, to say anything about the pledge of the sugar and payment to the Bank unless this had been the agreement, for on that day the price agreed upon was the market value and there was no motive for the defendant not to carry out the contract; that all the sugar was pledged made it imperative that the contract be made in just the form stated by the defendant that it was made. The Supreme

Court of Porto Rico also ignored the fact that the plaintiff on August 5, 1914, had the opportunity when he went to the Bank to make the deposit and get the sugar and having testified that he had more than enough funds on deposit at the same Bank he could easily have made the payment on August 5th. The conclusion reached by the Supreme Court of Porto Rico that the defendant broke its contract and was liable in damages, is seen to rest on no proper foundation.

The Supreme Court of Porto Rico did not have the advantage of having heard the witnesses testify and observe their manner of testifying, as did the District Judge, and having ignored the principal fact which must have influenced the District Judge in passing upon the credibility of the various witnesses, namely the fact that the sugar was pledged, the Supreme Court violated the almost universal rule which forbids an appellate court from reversing upon the facts, unless the findings of the District Judge are found most clearly to be erroneous.

Upon the question of damages the Supreme Court went even further afield, where it said:

> "In the case at bar it seems that defendant actually sold during the month of August large quantities of sugar at $6.52, apparently including the lot already sold to plaintiff at $3.22½, it follows that whether the difference in price be regarded as damages or as the proceeds of a resulting trust, the profit thus actually obtained by the defendant on the sugar of the plaintiff, belongs to the latter and not to the former. We are not disposed, therefore, to scrutinize very closely the question of what may or may not constitute the most appropriate technical measure of the damages sustained" (Rec., pp. 92, 93).

This action was not brought in equity to impress a trust on any of the defendant's property, but was purely an action at law to recover damages for a breach of contract,

and it is wholly immaterial what the defendant afterwards obtained for the sugar; the plaintiff is only entitled to the damages which he sustained from the breach of the contract if any breach, in fact, occurred.

The Supreme Court of Porto Rico ignored the fact that under the contract 160 sacks of the sugar were to be delivered during the week ending August 8th when the highest price was $1.26, and that the rest of the sugar was deliverable by the defendant at any time during that or the following week, and that up to Wednesday, the 12th, the price of sugar was below six cents a pound. To give damages as it did to the plaintiff for the price on Saturday, August 15th, the last day of the second week and the last day when any deliveries could have been made when the price was $6.52 a hundred pounds, was to ignore the admitted provisions of the contract that the sugar was to be delivered in instalments and not on the last day of the second week (when the price was $6.52). None of the authorities cited in the opinion of the Supreme Court of Porto Rico support this extraordinary stand on the question of damages.

In the Circuit Court of Appeals ,although the correctness of the conclusion of the Supreme Court of Porto Rico was challenged by the fifteen assignments of error (Rec., pp. 95, 96), the Court held that errors in rulings of law in the Supreme Court of Porto Rico could not be reviewed because not embraced in any bill of exceptions from that Appellate Court (Rec., p. 107). Therefore the only questions open were (1) whether the complaint stated a good cause of action on breach of contract; (2) whether the Supreme Court of Porto Rico exceeded its jurisdiction in entering final judgment; and (3) whether the facts found by the Supreme Court support the judgment which it rendered (Rec., p. 107). The learned Circuit Judge writing the opinion, was in error in stating that any findings of fact were made by the Supreme Court of Porto Rico

unless the statements made by the Court in the opinion constitute such findings. Such statements in the opinion only covered a few of the points in the case. The detailed findings of fact and conclusions of law of the District Judge were not substantially reversed or set aside. The Circuit Court of Appeals then took up the questions which it admitted could be reviewed under the limited powers which it held it could exercise upon the writ of error and held the complaint was good; that the Court of Porto Rico had a right to enter an affirmative judgment and "(3) the facts found support the judgment. It is unnecessary to restate them. They sufficiently appear in what has been above set forth" (Rec., p. 108).

POINT I.

If any binding contract for the sale of the sugar was made on August 4th, 1914, an essential part of the contract was that the plaintiff was required in order to release the pledge to the Royal Bank of Canada, to pay the contract price to that bank before the sugar was delivered.

In determining whether if any contract was made on August 4th, 1914, what were its terms, it is important to consider the fourth finding made by the District Judge (Rec., p. 11) which was based upon uncontradicted testimony that the sugar the parties were talking about over the telephone as a matter of fact had been pledged to the Royal Bank of Canada by a private document, executed on May 23rd, 1914 (Rec., pp. 84, 85), almost three months before. Having this pledge in mind it was but most reasonable to expect the contract to refer to this pledge, for unless the claims of the Bank were satisfied no sugar could have

been delivered. The letter written by the defendant corporation to the plaintiff (Exhibit C, Rec., p. 19) refers to the prior pledge of the sugar to the Bank when it is stated:

"(C) Mayaguez, Augst 4th, 1914.

Mr. Tomas Quinones, Mayaguez.

Dear Sir and Friend: We hereby ratify the sale we have made you of 748 sacks of sugar, second kind, weighing 252 pounds each sack, at price of $3.225 per 100 weight, which sugar is at your disposal at this Central, to be delivered to you during next week, and a wagon, with 160 sacks, which shall be dispatched as soon as we get the order from the Royal Bank of Canada, of this city. We also beg to enclose the corresponding invoice for the 748 sacks, which are valued at $6,079, which sum must be deposited by you at The Royal Bank of Canada, aforesaid, to our account, to be able to make the delivery as agreed.

Yours truly,

(Signed) ANA MARIA SUGAR CO., Inc.,

A. VALDES, President."

The invoice accompanying this letter gave the exact weights of the sugar (Exhibit D, Rec., p. 19) which was evidently intended by the defendant as being a substitute for the ordinary custom of weighing the sugar and indicated clearly that at least the defendant's understanding of the contract was that this transaction was not the customary one, as testified by plaintiff's witnesses, of paying for the sugar after its being weighed, upon delivery. At the time this letter of August 4th was sent there is no evidence that the price mentioned was not the fair and market value of the sugar and there was no possible motive on the part of the defendant to attempt to avoid the contract. The cross-letter sent to the defendant by the plaintiff (Exhibit B, Rec., pp. 18, 19) was inaccurate as to the number of sacks, mentioning 740 instead of 748, which the plaintiff

subsequently agreed was the correct amount (Exhibit E, Rec., p. 20). There is nothing stated in plaintiff's letter of August 4th, 1914, that was contradictory of an understanding to release the pledge of the sugar with the Bank by paying the purchase price directly to the Bank, and in fact no reference was made as to when the payment was to be made. The oral evidence on the subject is positive on the part of the defendant and largely negative on the part of the plaintiff, Mr. Monefeldt merely stating that he did not hear anything said about payment to the Royal Bank of Canada, but this is perfectly consistent with other testimony that all such expressions were used by Mr. Valdes, representative of the defendant, and that Monefeldt only heard that side of the telephonic conversation that was conducted by Mr. Quinones, the plaintiff. The learned District Judge, who saw the witnesses and observed their manner of testifying, made the second finding of fact (Rec., pp. 10-11) that the sugar was to be delivered as soon as the defendant received the order for delivery from the Royal Bank of Canada, Mayaguez branch, and that it was agreed that the value of the sugar should be previously deposited by the plaintiff in that Bank.

It is well settled in the Federal Courts that an Appellate Court will not reverse the decision of a Judge sitting at the trial who heard the witnesses and observed their manner of testifying when there is a sharply disputed question of fact, unless it is apparent that clear error was made by the lower court in his decision.

Villanueva v. *Villanueva*, 239 U. S., 293;
Lacy v. *McCafferty*, 215 Fed., 352 (C. C. A. 8th);
Semidey v. *Central Aguirre Co.*, 239 Fed., 610 (C. C. A. 1st);
First National Bank v. *Eiseman*, 246 Fed., 597 (C. C. A. 5th);

Trujillo and Mercado v. *Succession of Rodriguez*, 233 Fed., 208 (C. C. A. 1st);
Brookheim v. *Greenbaum*, 225 Fed., 763 (C. C. A. 2nd).

In *Brookheim* v. *Greenbaum*, COXE, *J.*, said:

> "The judge had the witnesses before him and is much better able to judge of their credibility than a Court which sees only their statements on paper. We should not reverse this finding upon a pure question of fact where the evidence justifies the finding even if we might have reached a different conclusion upon the evidence. In *Coder* v. *Arts*, 152 Fed., 943, at p. 946, 82 C. C. A. 91, 15 L. R. A. (N. S.), 372, the Court says:
>
> > 'When the Court has considered conflicting evidence and made a finding or decree it is presumptively correct and unless some serious error of law has intervened or some serious mistake of fact has been made, the finding or decree must be permitted to stand.'"

In *Semidey* v. *Central Aguirre Co.*, ALDRICH, District Judge, writing the opinion of the Court, said at pages 614 and 615:

> "While in an equity proceeding the court of review may and must examine the case *de novo* findings of fact by the court, who saw the witnesses and was in close touch with the locality and the physical conditions involved, will not be disturbed, except in case of clear and unmistakable error. *Villanueva* v. *Villanueva*, 239 U. S., 293; *Washington Securities Co.* v. *U. S.*, 234 U. S., 76, 78, *Stuart* v. *Hayden*, 169 U. S., 1, 14; *Trujillo and Mercado* v. *Succession of Rodriguez*, 233 Fed., 208, 147 C. C. A. 214."

Numerous decisions of the Supreme Court of Porto Rico heretofore laid down the rule we now assert but ap-

parently these cases were ignored by the Supreme Court in the case at bar.

Quevedo v. *Pino*, 15 P. R., 675-677, citing numerous cases;
Rico v. *Lopez*, 21 P. R., 201, 207.

While the Courts have stated that where questions of local law are involved and both Courts of Porto Rico have agreed, that their determination will not be reviewed unless the Court was convinced that clear error had been made,

Plazuela Sugar Company v. *Pastoriza*, 245 Fed., 115 (C. C. A. 1st);
Conron v. *Cauchois*, 242 Fed., 909 (C. C. C. A. 2nd).

the facts here are wholly different from those opinions. It is apparent that no question of local law is involved, the Porto Rican Civil Code not forbidding parties to make any legal contract that they deem proper (Civil Code, Sec. 1223).

Moreover, the fact that the plaintiff on August 10, 1914, finally accepted the defendant's understanding of the contract in so far as he presented a check to the Bank to release the sugar, clearly showed that that was the real agreement. All the other circumstances also show that the District Judge was right in his finding that the sugar was pledged and that the defendant did mention that fact, as he naturally would when making the agreement with the plaintiff for the sale of the sugar.

The testimony of Vals, the defendant's Treasurer, who stated that the defendant's President, Mr. Valdes, made this statement in the telephone conversation, the testimony of Mr. Hiltz, the Manager of the Bank and an unprejudiced witness, and that admission by the plaintiff on cross exam-

lination that in the conversation he asked Mr. Valdes whether the sugar belonged to the defendant *or to the Bank*, all show beyond a doubt that the agreement required the plaintiff to take up the sugar at the Bank before he could receive any delivery. The Supreme Court of Porto Rico did not have the benefit of having observed the manner of the plaintiff on cross examination as did the District Judge, or to observe with what frankness the other witnesses testified, and the decision of the Supreme Court of Porto Rico being so clearly erroneous in this respect, this Court, under all the authorities, should, upon this vital point, reverse the Supreme Court of Porto Rico and reinstate the findings of the District Court.

Should this be done, then clearly there was no breach of contract, for the plaintiff clearly first broke it by not depositing the money at the Bank as he was asked to do by both the officers of the defendant and Mr. Hiltz, the Manager of the Bank, who called him up on the telephone out of courtesy and told him that the money should be deposited with the Bank and also told him the same thing when the plaintiff came down to the Bank. If the plaintiff had the funds on deposit in the Bank as he stated and was a man of means, the condition of pre-payment could easily have been met by him, and the fact that the sugar was pledged, as is undisputed in this record, made the request to take it up at the bank most reasonable and was no possible reflection on the credit or standing of the plaintiff.

In this changing market, it was unreasonable to allow the plaintiff the option to deposit the money at the Bank during a long period of time when each day the sugar situation was so different. The Code of Commerce of Porto Rico contemplates a delivery and payment of price, in the absence of specific agreement to the contrary, as due within 24 hours after the transaction (Code of Commerce, Secs. 337, 339), so it was not necessary to state when the transaction was to be completed by the payment of the money

to the Bank. If the market, instead of steadily rising, had taken a drop during the week beginning August 10, 1914, and the price had gone down below the contract price, the plaintiff might never have gone to the Bank to take up the sugar, and to permit the plaintiff to wait indefinitely before deciding when to deposit the money in the Bank, made the contract wholly unilateral and unfair to defendant. The defendant did give the plaintiff three full banking days within which to pay the money, August 4th, 5th and 6th, 1914, and the plaintiff himself breached the contract by not making payment at the bank during this period. Defendant was fully justified in canceling the contract for this breach on the part of the plaintiff.

Civil Code, Porto Rico, Secs. 1067, 1091, 1369;
Graf v. *Cunningham*, 109 N. Y., 369;
City of New York v. *Third Nat. Bank*, 221 Fed., 175, 177 (C. C. A. 2nd); Cert. Denied, 238 U. S., 628.

Section 1067 of the Civil Code of Porto Rico provides:

"In mutual obligations none of the persons bound shall incur default if the other does not fulfill or does not submit to properly fulfill what is incumbent upon him."

In same section:

"Persons obliged to deliver or do something are in default from the moment when the creditor demands the fulfillment of their obligation, judicially or extra-judicially."

Section 1091 reads:

"The right to rescind the obligations is considered as implied in mutual ones, in case one of the obligated persons does not comply with what is incumbent upon him."

Finally, Section 1369 provides:

"The vendor shall not be bound to deliver the thing sold, if the vendee shall not have paid the

> price, or if a period for the payment has not been fixed in the contract."

The plaintiff having the burden of proving that the contract was as alleged in his complaint, upon any fair estimate of the evidence it is seen that the findings of the District Judge are correct and that the Supreme Court of Porto Rico must have been led to reverse these findings merely because it appeared that subsequent to August 4th, 1914, the price of sugar took a jump upwards, the reasoning being that the defendant must therefore have attempted to get out of the contract, which called for payment of a lesser price than what existed in the market when the deliveries were to be made. The burden of proving the contract was upon the plaintiff both as a matter of general law and under the Civil Code of Porto Rico. Section 1182 of the Civil Code provides:

> "Proof of obligations devolves upon the person claiming their fulfillment and that of their extinction upon those opposing it."

The Supreme Court of Porto Rico having made no finding that the contract was not as stated in Exhibit C, and as testified to by the defendant, the plaintiff failed in its burden and the judgment rendered by the District Court should be reinstated.

POINT II.

If the defendant's offer to sell the sugar providing the pledge to the Royal Bank of Canada was satisfied by paying the purchase price direct to the bank was not accepted, no valid contract existed.

The plaintiff's proof shows not only that the sugar was pledged, but that immediately after the telephone conversation the defendant wrote a confirmatory letter (Exhibit C, Rec., p. 19), that the money must be paid to the Royal Bank of Canada before any deliveries could be made. Unless this Court is prepared to hold that this confirmatory letter was an attempt to deceive the plaintiff and that the defendant never intended to make any sale whatsoever, it clearly must be considered as evidencing the defendant's ideas of the contract and to be the defendant's offer of sale of the sugar. That the plaintiff did not accept the defendant's offer, appears from the letter (Exhibit E), in which he says:

> "I agree with all except with the duty which you impose on me of paying for the article before receiving same" (Exhibit E, Rec., p. 20).

This refusal on the part of the plaintiff to accept the important condition of the defendant's offer of sale amounted in law to a rejection of the offer for it is well settled that an offer to constitute a binding contract must be accepted in the terms in which it is made. Any alteration in such terms or the raising of new ones, amounts to a rejection of the offer and there is no binding contract.

National Bank v. *Hall*, 101 U. S., 43;
Carr v. *Duval*, 14 Peters, 77;

Minneapolis, &c., R. R. v. *Columbus Rolling Mill*, 119 U. S., 149;
Beaumont v. *Prieto*, 249 U. S., 534;
Travis v. *Nederland Life Ins. Co.*, 104 Fed., 486;
Doyle v. *Hamilton Fish Corporation*, 234 Fed., 47, 50 (C. C. A., 2nd);
Groschke v. *Armour Fertilizer Works*, 245 Fed., 513 (C. C. A., 3rd);
Pool v. *Brunswick-Balke-Collender Co.*, 216 N. Y., 310.

In *National Bank* v. *Hall*, 101 U. S., 43, Mr. Justice SWAYNE, writing for this Court, said at page 49:

> "The minds of the parties, as shown by these letters, moved on parallel, not on concentric lines. There was not the meeting of minds and the mutuality of assent to the same thing, which are necessary to create a contract. * * *
>
> Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or equity."

At page 50, said:

> "A proposal to accept, or acceptance upon terms varying from those offered, is a rejection of the offer."

In *Minneapolis, &c., Ry.* v. *Columbus Rolling Mill*, 119 U. S., 149, the defendant Rolling Mill wrote to the plaintiff offering to sell to the plaintiff 2,000 to 5,000 tons iron rails at $54 per gross ton, spot cash, the offer to expire on or before December 20th, 1879. Instead of accepting the offer, the Railroad Company on December 16th, by telegram and letter ordered 1,200 tons at the same price. On December 18th, the defendant Rolling Mill declined to fill the 1,200 ton order of the Railroad Company at that price, after which the Railroad Company ordered 2,000 tons, which the defendant refused to

611. It was held by this Court that the letter and telegram of the Railway Company of December 16th, being but a qualified acceptance of the Rolling Mill's offer, was in fact a rejection of it, Mr. Justice GRAY in writing for this Court, saying at page 151:

> "The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other way withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. *Eliason* v. *Henshaw*, 4 Wheat., 225; *Carr* v. *Duval*, 14 Pet., 77; *National Bank* v. *Hall*, 101 U. S., 43, 50; *Hyde* v. *Wrench*, 3 Beavan, 334; *Fox* v. *Turner*, 1 Bradwell, 153."

In *Beaumont* v. *Prieto*, 249 U. S., 554, which was an appeal from the Supreme Court of the Philippine Islands, there was an offer made on December 4th, 1911, to sell certain lands for the price of its assessed Government valuation [307,000 pesos], the option to last for three months. A month and a half later and on January 17th, 1912, a letter was written to Borck, the assignor of the plaintiff in error, offering to buy the property for 307,000 pesos, payable on May 1st, 1912. This was rejected and the land was never conveyed. In affirming the judgment, Mr. Justice HOLMES writing for this Court, said:

> "The letter of January 17, plainly departed from the terms of the offer as to the time of payment and

> was, as it was expressed to be, a counter offer. In the language of a similar English case, 'plaintiff made an offer of his own * * * and he thereby rejected the offer previously made by the defendant * * *. It was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it.' *Hyde* v. *Wrench*, 3 Beavan, 334. Langdell, Cont., Sec. 18."

In *Peel* v. *Brunswick-Balke-Collender Co.*, 216 N. Y., 310, SEABURY, J., writing for the unanimous New York Court of Appeals, said at page 319:

> "When the plaintiffs submitted this offer in their letter of April 4th to the defendant, only one of two courses of action was open to the defendant. It could accept the offer made and thus manifest that assent which was essential to the creation of a contract or it could reject the offer. There was no middle course. If it did not accept the offer proposed, it necessarily rejected it. A proposal to accept the offer if modified or an acceptance subject to other terms and conditions was equivalent to an absolute rejection of the offer made by the plaintiffs." (Many New York cases cited).

Even if we assume that both the plaintiff and the defendant misunderstood each other during the telephone conversation of August 4th, 1914, and their respective letters of confirmation differing as to this important part of the contract, namely, the method of payment, represented respectively their honest different recollections of the conversation, then clearly there was no meeting of the minds and the plaintiff wholly failed in his burden of showing that the contract was as alleged by him in his complaint. If this be true, the Supreme Court of Porto Rico was not justified in awarding judgment for the plaintiff for any amount. In this connection it is important

to consider the second conclusion of law made by District Judge FOOTE, as follows:

> "II. That the proposal made in said letter to the defendant that the date of the delivery of the goods should be changed, constituted a proposal to modify the said contract, which was never accepted by the defendant" (Rec., p. 12).

Under the authorities cited, the late attempt made on the 10th of August (Exhibit K, Rec., p. 23), by the plaintiff to go to the Royal Bank of Canada and to pay the purchase price to the Bank to release its pledge and so obtain delivery of the sugar was wholly unavailing. The situation is very similar to that in the case of *Minneapolis, &c., R. R. v. Columbus Rolling Mill*, 119 U. S., 149, where it was held that the Railroad's attempt to order the 2,000 tons rails and to accept the original offer was invalid after they had once rejected the offer. No contract being in existence the offer was withdrawn and could not then be accepted.

In this case it is undisputed that on August 7th, 1914, following a refusal of the plaintiff to deposit the money with the Bank, the defendant's offer of August 4th, 1914, was withdrawn (Exhibit H, Rec., p. 22; see also Finding VIII, Rec., p. 11).

POINT III.

An improper measure of damages was adopted by the Supreme Court of Porto Rico.

Assuming, for the purpose of this discussion, that the defendant did breach the contract, the question then arises whether the Supreme Court of Porto Rico was not clearly in error in awarding to the plaintiff $6,173.24 (Rec., p.

93), based on the market price of the last day of delivery August 15, 1914, when the plaintiff had not paid one cent to defendant in this transaction and the entire price for the 188,496 pounds of sugar was only $6,079 (Rec., p. 19). In determining the measure of damages, it is important to remember that here there was no definite time for delivery of the sugar, but it was agreed:

> (1) that the 160 sacks of 252 pounds each, or 40,320 pounds in all, should be delivered during the week of August 4, 1914, while
>
> (2) the remainder of the sacks, 588, were to be delivered by the defendant at the convenience of the defendant, in the defendant's own ox-carts, and transported from the Central over 8 kilometers of road to the plaintiff's store at the Playa at Mayaguez at any time during the week beginning August 10th and ending August 15th, 1914.

This being, therefore, a contract involving delivery by instalments, the decisions are unanimous that the proper measure of damages must be determined by ascertaining the market price, when each of the instalment deliveries was due. Under this rule, in no event could the price of the 160 sacks deliverable during the first week exceed the market price of the sugar on Saturday, August 7th, which was $4.26 (Rec., p. 37), less the 20 cents deducted for payment in Porto Rico (Rec., p. 36), making the net price $4.06. The difference in price then for these 160 sacks, or 40,320 pounds, would be the difference between $3.22½ and $4.016, or $.83½ a hundred-weight, $336.67, and not the difference between $6.52 and $3.22½—$3.29½ or $1,338.54, taken by the Supreme Court of Porto Rico. It follows that on these bags alone that Court erred in giving $1,338.54 instead of $336.67 and that at least a reduction of $1,001.87 from the damages should be made.

The authorities as to instalment deliveries include the following:

Roller v. *Leonard,* 229 Federal, 607; (C. C. A., 4th);
Sizer v. *Melton & Son,* 129 Georgia, 143;
Brown v. *Miller, L. R.,* 7, Exch., 319;
Joslin v. *Irvine,* 6 H. & N., 512;
O'Gara v. *Ellsworth,* 85 App. Div., 216, 220;
New York & Philadelphia Coal & Coke Co. v. *Meyersdale Coal Company,* 236 Fed., 536 (C. C. A., 3rd);
Shreve v. *Brereton,* 51 Penn., 175, 185;
Sogola Lumber Company v. *Chicago Title & T. Co.,* 121 Ill. App., 292, 298;
Johnson & Thornton v. *Allen & Jemenson,* 78 Ala., 387;
Hebron Mfg. v. *Powell Knitting Co.,* 171 Fed., 817 (C. C. A., 3rd);
Youghiogheny & O. Coal Co. v. *Verstine, Hibbard & Co.,* 176 Fed., 972;
Thedford v. *Herbert,* 135 App. Div. (N. Y.), 174;
Williston on Sales, Sec. 991.

In *Roller* v. *Leonard,* 229 Fed., 607, instalment deliveries were provided for, and the Court said:

> "We are of the opinion that the contract did not authorize plaintiffs to arbitrarily, or otherwise than in their regular and usual course of business, and the capacity of defendant's mill properly operated, call upon defendant to ship extract in quantities, or at periods of time, not within the contemplation of the parties, as expressed in the written contract and conditions under which it was executed. While defendant, by failing to make the weekly reports, relieved plaintiffs of the duty of basing orders on such reports, and by notifying plaintiffs that he

would not ship any extract relieved them of the duty of sending orders, and by these breaches of his contract subjected him to an action for damages, they did not entitle plaintiff to demand of him that which he never promised or contracted to do, or to create arbitrarily conditions which were not contemplated by either party at the time the contract was entered into. The principle upon which the rights of plaintiffs and liability of defendant is fixed is stated by Mr. Sedgewick:

> 'When a contract is performable in instalments, such, for instance, as a contract to manufacture and deliver goods in stated amounts from time to time, and there is a repudiation during the period of performance, the damages for a breach consisting in the non-performance of subsequent instalments is to be estimated as at the time of performance of each (instalment), and not as at the time of the performance of the last instalment. If, for instance, between the time of the first breach, the value of the goods to be delivered fluctuates, the buyer who has failed to receive the instalment due him cannot demand damages, based on the value of the goods at the time the last instalment should have been delivered, but he must be content with a basis of compensation which will give him the value of each instalment at the time it should have been delivered.' 2 Dam., Sec., 636-b.

"The principle upon which damages are to be assessed in such cases is illustrated in *Brown* v. *Miller, L. R.* 7, Ex., 319. Defendant contracted to sell and deliver to plaintiff a large quantity of iron to be delivered in about equal portions—September, October and November, 1871. During the month of August defendant notified plaintiff that he did not intend to deliver any iron. Plaintiff, after the expiration of the time for the last delivery had passed, sued defendant for damages for breach of their contract. KELLY, *C. B.*, said:

> 'Now the proper measure of damages is that sum which the purchaser requires to put himself

> in the same condition as if the contract had been performed. The plaintiff might, if he had so elected, have treated the contract as at end, when the defendant announced his intention to break it. But that is a matter of election on plaintiff's part, and even although he had elected then to treat the contract as broken, yet in considering the question of damages, they would still be estimated with reference to the time at which the contract ought to have been performed; that is, in this case, at the ends of the months of September, October and November.'

"In *Joslin* v. *Irvine*, 6 H. & N., 512, 30 L. J., Ex. 78, defendant contracted to deliver naphtha in weekly parcels. He failed to perform his contract. WILDE, *J.*, said:

> 'I want to know the market price at the end of the first, second and third weeks, when the naphtha was to have been delivered. The damages must be assessed with reference to the market price on each of the days fixed for the delivery of the naphtha.'"

In *New York & Philadelphia Coal & Coke Co.* v. *Meyersdale Coal Co.*, 236 Fed., 536 (C. C. A., 3rd, 1916), the Court quoting the following sentence from the correspondence, said (p. 538):

> "'You understand that we wish the monthly shipment spread over each month, and by that we mean not to ship any large amount on one day and then not ship any more for a long time.'
>
> "(2) The bearing of this sentence upon the measure of damages is obvious. If it is not part of the contract, the parties agreed upon the delivery of 2,500 tons 'monthly,' and such an obligation would be fulfilled by delivery on the last day of the month. As no coal was ever delivered, the measure of damages would be the difference between the contract price and the market price at the end of each month. Since, however, the latter justifies the

conclusion that the parties intended, and contracted with sufficient clearness, that deliveries should be spread over each month, the best measure available for a complete failure to deliver would be the average price during the month."

In *O'Gara* v. *Ellsworth*, 85 App. Div., 216, 220, HOUGHTON, *J.*, said, page 220:

"The damages of the plaintiff depended upon the market price at which he could have purchased the coal at the time and place of delivery. (*Dana* v. *Fiedler*, 12 N. Y., 40). If coal could not be obtained from the Crescent mine, evidence of the price of similar coal at places not distant, or in other controlling markets, would be proper, not for the purpose of establishing the market price at another price, but for the purpose of showing the market price at the place of delivery. (*Cahen* v. *Platt*, 69 N. Y., 348.) Besides, the prices given by the witnesses, at Joliet and Chicago, were retail prices. Market value is the price at which goods can be replaced for money in the market; not the retail price for which they are sold. (*Wehle* v. *Haviland*, 69 N. Y., 448.) The highest market price in the season of 1899 was not the fair measure of damages, even if it had been proper to prove the price of coal at Joliet and Chicago. Where property should have been delivered at any time within a certain period, the law, in regulating the measure of damages, contemplates a range of the entire market and the average of prices as thus found, running through the period of time. Neither a sudden and transient inflation nor depression of prices should control the question."

In the present case we have the time of delivery within the control of the defendant, who might have delivered the sugar in the ox-carts at any time during the week beginning August 10, 1914, and doubtless the sugar would have been loaded on the ox carts each day of that week. If these had all been delivered on the 10th, the price of the sugar,

which was $4.97 less 20 cents, or $4.77, made the difference between the contract price and the market price on that day, but $1.345 each hundred pounds, or $2,555.27 for the entire 188,496 pounds and not $6,173.24 which would require a deduction of $3,617.97 from the judgment. If the average price of the week be taken a large reduction also would result.

The authorities also state that where goods are deliverable within a certain period at the seller's option, the market price on the day when the seller gave plaintiff notice of his intention not to deliver is to be taken in computing the damages.

> 35 Cyc., 638;
> *Woerman* v. *McKinney-Quedry Co.*, 174 Kent, 521.

Cyc., states the rules as follows:

> "but if the goods were deliverable within a certain period at the seller's option, the market price on the day when he gave plaintiff notice of his intention not to deliver is to be taken in computing the damage, that day being the time of default" (35 Cyc., 638).

In the *Woerman* v. *McKinney-Quedry Co.* case, it is stated:

> "All the authorities are to the effect that the time at which the market or true value of the goods must be ascertained in estimating the damages for a failure to deliver personal property is the time fixed in the contract for the delivery. If the articles may be delivered under the contract within a designated period at the option of the seller, when he shall give notice of his intention not to deliver them, this will be considered as the time of the breach of the contract, but if the article is to be delivered within a certain period, at the option of the purchaser, although the seller gives notice of his intention not to make the delivery, the market price or value of

> the article will not be computed as of the date of the notice, but as the time when the delivery should have been made. 35 Cyc., 637."

Adopting this rule, and assuming that the contract was breached by the defendant, the damages would be determined as of the 7th of August, 1914, when the plaintiff received word that the defendant would not deliver the sugar, and the price then was but $4.26 a hundred pounds, and with the 20 cent Porto Rico deduction $4.06, a difference of $.83½ from the contract price, and even assuming that the entire 188,496 pounds were to be included in this arrangement, the plaintiff's damages would have been $1,573.96, and not $6,173.24, and a reduction of $4,599.28 from the judgment would result.

The Uniform Sales Act which is in effect in Massachusetts, Section 67, and in New York (Personal Property Law, Section 148) and which is derived from the English Sales Act and is, in this respect, declaratory of the common law, has the following provision:

> "3. When there is an available market for the goods in question, the measure of damages in the absence of special circumstances showing approximate damages of a greater amount is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or if no time was fixed then at the time of the refusal to deliver."

Should this rule be used, then clearly no definite times having been fixed for delivery, the market value on August 7th, 1914, when plaintiff received word that the defendant refused to deliver, should be taken. If, on the contrary, this Court should hold that a definite time was fixed, but that the defendant had the option to deliver the sugar partly during the week of August 4th, and the rest during the week beginning August 10th and ending August 15th, then the average price during the entire period when these

instalment deliveries could have been made should be taken, as the authorities already quoted indicate that this is the just rule.

In no event is it just to take the highest price during the entire period, which existed on the last day of which delivery could have been made, and hold the plaintiff responsible for the difference between the contract price and this extreme high price. Upon this measure of damages, plaintiff is relieved of the burden of making any attempt whatever to reduce his damages by making other purchases, and it has always been held, even on an admitted breach of contract, that the plaintff is not justified in running up the damages, but must use reasonable means to reduce them.

Wade McHenry Lumber Co. v. *Frank Spangler Co.*, 230 Fed., 418 (C. C. A., 5th);
Warren v. *Stoddart*, 105 U. S., 224.

The Supreme Court of Porto Rico evidently realized that its theory of damages was unjustly harsh when it stated that defendant might be held on the theory of a resulting trust because the defendant itself sold some of the sugar for $6.52. The action was not brought to impress any trust, but was a pure action at law for damages for breach of contract, and the principles applicable are those common to the law of sales throughout the commercial world. It is wholly immaterial for purposes of this action what the defendant got for this sugar, for if it broke its contract and the market had dropped and it had gotten only 3 cents a pound for its sugar, this would have been absolutely no defense to the action if the proper measure of damages at the time the contract was broken by it was a much larger sum. Similarly, the fact that it got a high price for its sugar cannot affect the measure of damages. The present case, with the damages thus far

higher than the entire contract price for the 748 sacks of sugar, shocks the judicial conscience. A reversal of this unjust judgment upon this point, therefore, must follow even if it be conceded that the contract was made as alleged by the plaintiff.

Conclusion.

This brief has been written upon the assumption that this Court in granting the writ of certiorari (248 U. S. 555) has determined that the technical rules of procedure applied by the United States Circuit Court of Appeals for the First Circuit should not prevent the merits of this case from being reviewed. In applying for the writ of certiorari your petitioner referred this Court to Chapter 22, Act of January 28, 1915, amending Section 246 of the Judicial Code of the United States providing for appeals and writs of error from the Supreme Court of Porto Rico and permitting this Court to require by certiorari

> "that the case be certified to it after final judgment or decree with the same power and authority as if taken to that court by appeal or writ of error."

The Judicial Code has abolished the former procedure which under the Act of April 7, 1874, Chapter 80, Section 2, required a statement "of the facts of the case in the nature of a special verdict." Under the Act of Congress of September 6, 1916, Chapter 448, Section 4, Federal Courts are authorized to disregard any errors in practice that do not affect the merits of the case and this Court, in *Friedcricksen* v. *Renard* (247 U. S. 207, 213) stated that substance should never be subordinated to forms of procedure.

That exceptions need not be taken to the action of an intermediate Appellate Court, was urged by your petitioner in applying to this Court for the writ of certiorari. It urged that there was no statute of Porto Rico requiring

exceptions to be taken to decisions of the Supreme Court of Porto Rico, and that the action of the United States Circuit Court of Appeals in this case, if approved, will revolutionize the entire practice prevalent in Porto Rico.

Upon the general proposition that exceptions to the action of an Appellate Court need not be taken, the following authorities were cited:

Shawnee Compress Co. v. *Anderson*, 209 U. S., 423.

Corpus Juris, Vol. 3, p. 951, Sec. 839.

Andrews v. *Cohen*, 221 N. Y., 548.

It has never been deemed necessary on an appeal from the Circuit Court of Appeals reviewing a lower Federal Court, District or Circuit, that there should be any bill of exceptions as to the rulings of the Appellate Federal Court — the Circuit Court of Appeals. So long as the plaintiff-in-error comes to this court with assignments of error, the record as considered by the Circuit Court of Appeals is reviewed by this Court, which puts itself in the place of the Circuit Court of Appeals and determines whether or not that court was correct in making its decision upon the law and upon the other questions presented to that court. In *Shawnee Compress Co.* v. *Anderson* (209 U. S., 423) where the Supreme Court of the Territory of Oklahoma had reversed the lower court, this court said:

> "In passing on the second proposition the Supreme Court decided adversely to the view taken by the trial court. The court, therefore, must either have considered that there was not some evidence supporting the conclusions of fact of the trial court or must have deemed the principles of law which the trial court upheld were not sustained by its conclusions of fact. As our review, in the nature of things, is confined to determining whether the court below erred, it follows that our reviewing power under the circumstances is coincident with

the authority to review possessed by the court below, and therefore we are confined, as was the court below, to determining whether there was some evidence supporting the findings and whether the facts found were adequate to sustain the legal conclusions. *Southern Pine Lumber Co.* v. *Ward*, 208 U. S., 126."

In Corpus Juris, article on appeal and error (Vol. 3, p. 951, Sec. 839), it is stated:

> Sec. 839. k. Review of Decisions of Intermediate Courts. Proper exceptions are generally necessary, as in other cases, on appeals or writs of error from or to intermediate appellate courts, where there has been a trial *de novo*. It is otherwise where the intermediate court merely reviews the record brought up from the inferior court, since, if the intermediate court has erred in its judgment, the error will appear by *the record of that court without any bill of exceptions*. But the reviewing court will not, on appeal from the intermediate court, review rulings in the original court to which no exceptions were saved in that court.

In *Andrews* v. *Cohen* (221 N. Y. 148), Andrews, *J.* said at pages 152-153:

> "Where the Appellate Division reverses or modifies a judgment of the Trial Term and orders a judgment proceeding on a different theory of the facts, it must make such additional findings as are necessary to support the judgment which it has ordered. *No exception need be taken to the findings. They are to be reviewed by us.*"

The Bar of Porto Rico would doubtless appreciate a statement from this Court upon the question of procedure involved in this case for its future guidance.

The judgment of the Circuit Court of Appeals affirming the judgment of the Supreme Court of Porto Rico should be reversed and the judgment of the District Court dismissing the complaint affirmed, with costs to the petitioner in all courts.

December, 1919.

Respectfully submitted,

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E. CROSBY KINDLEBERGER,
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Supreme Court of the United States,

OCTOBER TERM, 1920.

No. 54.

ANA MARIA SUGAR CO.,
Petitioner,

AGAINST

TOMAS QUIÑONES,
Respondent.

BRIEF FOR RESPONDENT.

I.

1. The appeal to the Supreme Court from the Court "a quo" was supported by a bill of exceptions (R. 75).

2. The Supreme Court of Porto Rico is not a *purely Appellate Court,* but an intermediate Court, it may review questions of fact, make new findings and reverse the judgment of the District Courts on such questions of fact (Compilation of Revised Statutes and Codes of Porto Rico, p. 241-S. 1141 and Sect. 306, also see Opinion Circuit Court of Appeals, R. 140).

The true Appellate Court is the Circuit Court of Appeals for the First Circuit.

3. No special form is required for the Supreme Court of Porto Rico to make findings of fact. They may be made, as in the case at bar, in a general way. Rosaly *vs.* Graham, 227 U. S. 584, at 590-591.

4. **There being no bill of exceptions, the Circuit Court could not review errors of law during the trial.** Walton *vs.* U. S. and other authorities cited in Opinion of Circuit Court (R. 139).

5. Under the authorities, the writ of *Certiorari* must be vacated.

II.

1. The writ cannot take the place of an appeal from the Circuit Court, and open for review all questions of law and fact, which is the purpose sought by petitioner.

2. The Supreme Court cannot on *Certiorari* assume the position of a trial Court. Petitioner is asking this Court of last resort, to do, what it claims the Supreme Court, a Court of intermediate jurisdiction, had no authority to do, namely, to review the whole case on questions of evidence.

III.

1. No findings of fact in the form of a special verdict are now required in Porto Rico.
   Porto Rico *vs.* Emanueli, 235 U. S. 251-255.

2. The Circuit Court of Appeals in considering the appeal as a writ of error, applied the provisions of chapter 448, Laws of Congress of September 6, 1916.

3. At page 119 (R. 89-90) the Supreme Court of Porto Rico explains why detailed findings are unnecessary and useless, but makes a *specific finding* as to the gist of defendant's case, namely *"that in the conversation by telephone, on the 4th of August, which constituted the true contract between the parties, nothing whatever was said about a deposit of money as a condition precedent to the delivery of the sugar."*

If the only purpose in making specific findings of fact is to permit appellant to incorporate in its assignment of errors and bill of exceptions the specific grounds for the appeal, this purpose was fully served by the finding above quoted. Nothing can be more definite or specific. *No exception to this finding was however taken or assigned by appellant, in the Circuit Court.*

4. *No assignment of error or exception was taken to the action of the Supreme Court of Porto Rico in assuming the review of questions of fact and reversing the lower Judgment, or to its failure to make specific findings* (see R. 95-96)—Error VI of appellant (R. 95)—only attacks power of the Court to review the evidence and reverse judgment *"upon the condition precedent for the payment of said sugar,"* but not as to the power of the Court *in general* to review questions of fact, which objection was waived, by failure to take specific exception thereto.

Appellant cannot be heard, for the first time in these proceedings, to contest the authority of the intermediate Court, which it had already impliedly admitted.

IV.

1. It is elementary that an Appellate Court may review the evidence, even if contradictory, when the trial Court acted arbitrarily or with manifest prejudice towards one of the parties. Such was the case with the trial Court. See Transcript of record of District Court. Pp. 1-75 Record on Writ of *Certiorari*.

Writ should be vacated and Petition dismissed.

Respectfully submitted,

JORGE V. DOMINGUEZ,
Attorney for Respondent.

ANA MARIA SUGAR COMPANY, INC., *v.* QUINONES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 54. Argued October 21, 1920.—Decided December 6, 1920.

1. The rule that errors in rulings of law committed in a trial court cannot be considered on writ of error unless raised by bill of exceptions has no application to rulings by an intermediate appellate court, like the Supreme Court of Porto Rico, although it has power to review the evidence, make new findings of fact and enter such judgment as it may deem proper. Such rulings are part of the record and need not be excepted to. P. 247.
2. The jurisdiction of the Circuit Court of Appeals for the First Circuit under the Act of January 28, 1915, to review judgments of the Supreme Court of Porto Rico, does not include power to review findings of fact made by that court in an action at law. P. 248.
3. A mistake in bringing up such a case by an appeal instead of a writ of error, is cured by the Act of September 6, 1916, but that act does not abolish the distinction between the two modes of review, and the case will be reviewed as on writ of error. *Id.*
4. Where a judgment of the Supreme Court of Porto Rico in an action for breach of contract was assailed in the Circuit Court of Appeals as based on a particular method of measuring damages, alleged to have been erroneous, but it appeared from the opinion of the former court that the damages were allowed on other grounds which were

not assigned as error or otherwise objected to in the Circuit Court of Appeals and were not there considered, *held*, that they could not be insisted upon as grounds for reversal by this court. P. 249.
251 Fed. Rep. 499, affirmed.

THE case is stated in the opinion.

Mr. E. Crosby Kindleberger for petitioner.

Mr. Jorge V. Dominguez, for respondent, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Quinones sued the Ana Maria Sugar Co., Inc., in a district court of Porto Rico to recover damages for breach of an oral contract to deliver sugar. Liability was denied on the ground that plaintiff had agreed to deposit the purchase price in a bank to defendant's credit before the time for delivery and failed to do so. The trial judge, sitting without a jury, found on conflicting testimony that this stipulation was part of the contract; and, as the deposit had not been made, entered judgment for the defendant. Quinones appealed to the Supreme Court of Porto Rico with a bill of exceptions which embodied all the proceedings taken and included the evidence. The Supreme Court did not, like the trial court, make specific findings, but it found as a fact upon a review of conflicting evidence that the stipulation relied upon by the company had not been made, reversed the judgment of the trial court, and itself entered judgment for Quinones in the full amount claimed with interest. 24 P. R. 614. From that judgment the company appealed to the United States Circuit Court of Appeals for the First Circuit and assigned fifteen errors. Ten of them charged in different forms that the findings of fact on the main issue were erroneous; three related to the measure of damages; the others were that the complaint did not set

forth a cause of action and that the facts found were insufficient to support the judgment. The Circuit Court of Appeals held that it could consider the last two errors assigned, since they appeared on the face of the record. It gave as the reason for declining to consider the others, that the company had failed to submit to the Supreme Court any request for rulings and had taken no exceptions to rulings made. Concluding that the complaint set forth a good cause of action, that the Supreme Court had power to enter the judgment for Quinones and that the facts found supported its judgment, the Circuit Court of Appeals affirmed it. 251 Fed. Rep. 499. The case comes here on writ of certiorari. 248 U. S. 555.

First. The rule relied upon by the Circuit Court of Appeals for refusing to consider errors assigned is well settled. Errors in rulings of law occurring in the course of the trial cannot be considered on writ of error, unless incorporated into the record by bill of exceptions, *Rodrigues* v. *United States*, 198 U. S. 154, 165, because they are not part of the record proper, *Newport News & Mississippi Valley Co.* v. *Pace*, 158 U. S. 36. Compare *Nalle* v. *Oyster*, 230 U. S. 165. But this rule applies only when the error complained of is that of the trial court. It has no application when the errors assigned are wholly those alleged to have been committed by an intermediate appellate court; for if the intermediate court has erred in its judgment, the error will appear by the record of that court without a bill of exceptions. Compare *Morris* v. *Deane*, 94 Virginia, 572. This is true, although the intermediate appellate court has, like the Supreme Court of Porto Rico, power to review the evidence, to make new findings of fact thereon and to enter such judgment as to it may seem proper. See *Compilation of Revised Statutes and Codes of Porto Rico*, § 1141, p. 241; § 5350, p. 867. Compare *Andrews* v. *Cohen*, 221 N. Y. 148, 152-3. No complaint was made by the company of any action taken by the court of first

instance, which had decided in its favor. The errors assigned in the Circuit Court of Appeals related wholly to action taken by the Supreme Court. The reason given by the Circuit Court of Appeals for refusing to consider the errors assigned was, therefore, unsound. But, for other reasons, which will be stated, its decision was right.

Second. Under § 35 of the Act of April 12, 1900, c. 191, 31 Stat. 77, 85, the power to review final judgments and decrees of the Supreme Court of Porto Rico, then exercised exclusively by this court, was limited to matters of law. *Garst* v. *De Rubio*, 209 U. S. 283; *Gonzales* v. *Buist*, 224 U. S. 126; *Rosaly* v. *Graham*, 227 U. S. 584; *Ochoa* v. *Hernandez*, 230 U. S. 139; *Porto Rico* v. *Emmanuel*, 235 U. S. 251. When that act was superseded by § 244 of the Judicial Code, writs of error and appeals from the insular Supreme Court became subject to the same regulations which governed appeals from the district courts of the United States. Thereby this court acquired power to review questions of fact in cases coming to it on appeal in equity or admiralty, *Elzaburu* v. *Chaves*, 239 U. S. 283, 285; but in actions at law which are reviewable on writ of error, there was no right in this court to review the facts, although the case was tried without a jury. *Behn* v. *Campbell*, 205 U. S. 403, 407. The jurisdiction to review judgments and decrees of the Porto Rico courts conferred upon the Circuit Court of Appeals by Act of January 28, 1915, c. 22, 38 Stat. 803, is subject to the same limitation. The cause of action here sued on is in its nature a legal one. The review should therefore have been prosecuted by writ of error instead of by appeal, although the case was tried without a jury. *Oklahoma City* v. *McMaster*, 196 U. S. 529. By reason of § 4 of the Act of September 6, 1916, c. 448, 39 Stat. 727, this failure to adopt the proper appellate proceeding is no longer fatal. But the provision does not abolish the distinction between writs of error and appeals. It merely provides that the party seeking review

shall have it in the appropriate way, notwithstanding a mistake in choosing the mode of review. *Gonzon* v. *Compañía General, etc.*, 245 U. S. 86.

It was not contended in the insular Supreme Court that there was no legal evidence to support the finding of the district court. Its judgment was reversed solely because the insular Supreme Court reached a different conclusion on the issue of fact raised by conflicting testimony. Nor was it contended in the Circuit Court of Appeals that there was no legal evidence on which the insular Supreme Court could properly rest its finding. Ten of the assignments of error were directed to findings of fact by the Supreme Court. As these assignments of error raised no question of law and as the Circuit Court of Appeals had no power to review findings of fact in an action at law, it properly denied consideration to these ten assignments of error.

Third. It is contended that the judgment of the Circuit Court of Appeals should be reversed because the Supreme Court adopted an erroneous measure of damages. The contract was made August 4, 1914, and the contract price was $3.22½ per hundred weight. All the sugar was to have been delivered before the close of the following week which ended on August 15. The Supreme Court allowed as damages the sum of $6,173.24 with interest. It is insisted here that the sugar was deliverable in instalments; that there was a gradual rise in sugar between August 6 and August 15; and that the Supreme Court should have determined the amount recoverable by ascertaining the market price when each of the instalments was deliverable.

In the Circuit Court of Appeals the company likewise assigned as error that the Supreme Court had allowed compensation based upon the difference between the contract price of the sugar and its market price at the end of the term fixed for delivery. This assignment en-

titled it to have that question considered in the Circuit Court of Appeals, although no exception had been taken in the Supreme Court. The Circuit Court of Appeals did not consider whether the Supreme Court had adopted the proper measure of damages. It decided only that the Supreme Court was not obliged to send the case back to the court of first instance to fix the damages; that it had power to do so itself upon a review of the evidence introduced below; and that its discretion in doing this could not be said to have been exercised unreasonably, since the question of damages had been tried fully below, citing *Burnet* v. *Desmornes*, 226 U. S. 145, 148.

The difficulty with the company's contention is that it does not appear that the Supreme Court fixed the amount of the recovery by applying the measure of damages objected to. The contention that it did so finds some support both in the complaint and in the evidence. But the opinion which discusses the subject of damages at length rests the allowance on other grounds. The court found that the company had, during the month of August, sold at $6.52 large quantities of sugar, including the lot in question, and justified its allowance of damages on three grounds: (1) That on the facts the profits through sale at increased market prices were in contemplation of the parties when the contract was entered into, and the profit which would have been earned, being ascertainable, could be recovered at common law; (2) that the profits were earned by the company on sugar actually belonging to Quinones, and that under the Civil Code of Porto Rico he was entitled to these profits either "as damages or as the proceeds of a resulting trust"; and (3) that if the company wished to limit the damages by the market price on August 6, it must have proved that other sugar was obtainable on that day in Porto Rico, at what it contended was the then market price, but that it had not done so. These rulings by the Supreme Court on the

measure of damages were not assigned as error in the Circuit Court of Appeals and so far as appears objection to them was not otherwise called to its attention. Under Rule 11 of that court, 150 Fed. Rep. xxvii, errors not assigned are to be disregarded, except that the court, in its discretion, may notice a plain error not assigned. As the above rulings of the Supreme Court on the measure of damages were not assigned as errors in the Circuit Court of Appeals and were not considered by it they cannot be insisted upon here as grounds for reversal.[1]

The judgment of the Circuit Court of Appeals is

Affirmed.